

Volume 7

Pages 1157 - 1274

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

UNITED STATES OF AMERICA, )  
                               )  
Plaintiff,                 )  
                               )  
VS.                         ) NO. C 13-00133 WHO  
                               )  
BAZAARVOICE, INC.,         )  
                               )  
Defendant.                 )  
                               )

San Francisco, California  
Wednesday, October 2, 2013

TRANSCRIPT OF PROCEEDINGS

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## I N D E X

Wednesday, October 2, 2013

<u>DEFENDANT'S WITNESSES</u>	<u>PAGE</u>	<u>VOL.</u>
<u>FRIEDLAND, CHRISTIAN</u>		
(SWORN)	1161	7
Direct Examination by Mr. Feldman	1161	7
Cross-Examination by Mr. Lepore	1177	7
<u>KATZ, TIMOTHY</u>		
(SWORN)	1196	7
Direct Examination by Mr. Sher	1196	7
Cross-Examination by Mr. Comenetz	1207	7
<u>MAKI, SAMUEL JAME</u>		
(SWORN)	1210	7
Direct Examination by Mr. Sher	1210	7
Cross-Examination by Ms. Scanlon	1217	7
<u>KREBS, CHRISTOPHER K.</u>		
(SWORN)	1219	7
Direct Examination by Mr. Liddiard	1220	7
Cross-Examination by Ms. Scanlon	1226	7
<u>WEBCOLLAGE</u>		
By Videotaped Deposition	1229	7
<u>SIERRA TRADING POST</u>		
By Videotaped Deposition	1244	7

**E X H I B I T S**

<u>DEFENDANT'S EXHIBITS</u>	<u>IDEN</u>	<u>EVID</u>	<u>VOL.</u>
DX1152	1269	7	
DX1418	1228	7	
DX1644	1259	7	
DX1668	1259	7	

I N D E XE X H I B I T SDEFENDANT'S EXHIBITSIDEN   EVID   VOL.

DX1724                                    1244      7

DX1746                                    1244      7

1        Wednesday - October 2, 2013

1        8:00 a.m.

2                    P R O C E E D I N G S

3                    ---000---

4        **THE COURT:** Good morning, everybody. Please be  
5 seated.

6        **ALL:** Good morning, Your Honor.

7        **MR. FELDMAN:** Good morning, Your Honor.

8        **THE COURT:** Mr. Feldman?

9        **MR. FELDMAN:** Bazaarvoice calls as its witness  
10 Mr. Christian Friedland.

11        **THE CLERK:** Please stand and raise your right hand.

12                    CHRISTIAN FRIEDLAND,

13 called as a witness for the Defendant, having been duly sworn,  
14 testified as follows:

15        **THE WITNESS:** I do.

16        **THE CLERK:** Be seated.

17        And please state your full name and spell your name for  
18 the court reporter.

19        **THE WITNESS:** Christian Friedland; C-H-R-I-S-T-I-A-N,  
20 F-R-I-E-D-L-A-N-D.

21                    DIRECT EXAMINATION

22        **BY MR. FELDMAN:**

23        **Q.** Good morning. We met a minute ago but, again, I'm Boris  
24 Feldman. I represent Bazaarvoice.

25        Could you tell us your educational background, please?

A. Yes. My undergraduate studies were both in computer science and political science. My graduate studies were in computer science. I achieved a Bachelor's degree in political science with a minor in computer science, and I dropped out of the graduate school program for computer science because I started my company.

Q. Have you ever done any software engineering?

A. Since I was about nine years old, yes, I've been involved in software engineering.

Q. So that's about five years?

(Laughter)

A. Too kind.

**Q.** What is your current job?

**A.** I'm the president of Build.com, a half-a-billion-dollar online retailer of home improvement products sold on the Internet. We compete against Home Depot and Lowe's.

**Q.** Is Build.com publicly owned, private, or something else?

**A.** So Build.com, I founded the company back in 2000 and I sold the company to a large British conglomerate called Wolseley PLC out of the U.K. in 2007, and they own a hundred percent of the company and I operate as president of the company and have been since the sale in 2007.

Q. Okay. I'm going to hand you a document. I'm not marking it as an exhibit. I just want to use it as a way to illustrate your testimony for the Court, but if the Court wants me to.

FRIEDLAND - DIRECT / FELDMAN

1       And I represent to you I actually pulled this product at  
2 random on your Web site. I went on and just hit one. I didn't  
3 try to find one that looked better for us.

4       I would display the actual Web page, but I'd mess it up;  
5 but if you look at the bottom of the exhibit, it shows the URL.

6 **A.** (Witness examines document.)

7 **Q.** Does that look to you like a representative page of a  
8 product on the Build.com Web site?

9 **A.** It does.

10 **Q.** And if you look in the lower half of the page, it says  
11 "Reviews." What does the number 10 mean?

12 **A.** The 10 indicates that there are 10 customer reviews on  
13 this product. So 10 of our customers -- we solicited 10 of our  
14 customers to provide feedback on that specific product.

15 **Q.** And then if you flip through the pages after that, they  
16 have the reviews, the stars and reviews. Do you see that?

17 **A.** Correct.

18 **Q.** I'm going to hand up to you a second page from that Web  
19 site.

20 **A.** (Witness examines document.)

21 **Q.** It's the same page, sir, but on this one I clicked on  
22 "Product Q & A," which is in the middle, the tab next to  
23 "Reviews." So that's what that pulled up.

24       Can you tell us what the "Product Q & A" portion is?

25 **A.** Absolutely. So the product Q & A is where customers are

1 allowed on the page to ask a specific question about the  
2 product; and once they ask a question about the product, our  
3 reps will respond to that answer. And then we post that answer  
4 publicly on the Web site to try to avoid people from calling in  
5 and providing them more data along with a search engine  
6 optimization benefit of having unique content on the Web site.

7 **Q.** Do you sell that product, that Kohler single-function  
8 showerhead, on any sites other than just Build.com?

9 **A.** We do.

10 **Q.** Where?

11 **A.** We sell it on FaucetDirect.com. We sell it on Faucet.com.  
12 We sell it on Amazon. We sell it on eBay. We sell it -- and  
13 many other sites and locations are we marketing to sell that  
14 specific Kohler product.

15 **Q.** Okay. I'm going to hand you a document from the  
16 Amazon.com Web site.

17 **A.** (Witness examines document.)

18 **Q.** This is not your Web site. As you see at the bottom,  
19 there's a URL for the Amazon site.

20 Does that look like a familiar page to you of how some of  
21 your products are displayed at Amazon?

22 **A.** It is. It is absolutely. That is how we are displayed on  
23 Amazon.

24 **Q.** Right. So if you look down, somebody searching on  
25 Amazon.com for that showerhead, you're listed fifth down. It

FRIEDLAND - DIRECT / FELDMAN

1 says "Build.com"?

2 **A.** Correct.

3 **Q.** And then under "Build.com," it says, "93 percent positive,  
4 4,195 total ratings." Those refer to ratings about your  
5 company, not about that product; right?

6 **A.** Correct.

7 **Q.** Okay. I only have two more documents, then I'll leave you  
8 alone.

9 **A.** (Witness examines document.)

10 **Q.** Mr. Friedland, this is also from the Amazon.com Web site  
11 if one searches for that Kohler showerhead there. This page  
12 says something about product ads from external Web sites, ships  
13 from and sold by Build.com. What's that?

14 **A.** So that is part of Amazon's product called -- their  
15 equivalent of a shopping engine in the sense that -- or a  
16 comparison shopping engine.

17 So Amazon will actually send customers to our Web site.  
18 They will charge us a marketing fee for doing so. So it's  
19 actually a paid-inclusion ad. So when you click on that, it  
20 will actually take you to the Build.com Web site where you can  
21 buy that product rather than buy it direct from Amazon.

22 **Q.** I think you mentioned before, you showed us that on the  
23 Build.com Web site for the showerhead there were 10 customer  
24 reviews?

25 **A.** Correct.

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1   **Q.**   Last document, please.

2   **A.**   (Witness examines document.)

3   **Q.**   This is from the Amazon.com Web site. You can see the URL  
4 at the bottom.

5           What does this appear to be to you?

6   **A.**   This would be the customer reviews page of that same  
7 Kohler showerhead, but its feature and listing on the  
8 Amazon.com Web site.

9   **Q.**   How many reviews for that product where you had 10 reviews  
10 does Amazon have?

11   **A.**   138.

12   **Q.**   Okay.

13   **A.**   You're making me feel bad.

14   **Q.**   I'm not trying to.

15           How would you say -- does Amazon affect your business?

16   **A.**   Yes.

17   **Q.**   How?

18   **A.**   Amazon -- Amazon is an incredibly predatory competitor  
19 that has built an entire eCommerce ecosystem and is reducing  
20 our overall growth and much of the growth of any online  
21 retailer that's currently selling commodity that is online.

22 They are a fierce, vicious, cutthroat competitor in retail.

23   **Q.**   So given your view of that, why do you sell your products  
24 through Amazon as we saw in one of those slides?

25   **A.**   As an act of contrition, because at this point in the

FRIEDLAND - DIRECT / FELDMAN

1 stage of eCommerce over the last number of months, Amazon  
2 generates so much key-in retail traffic today. As for  
3 yourself, Boris, when you go to the Internet to shop for  
4 products, you go to one of two locations, most people at least,  
5 Google or at sometime it was Bing or one of these other Web  
6 sites. Now people go to one of two locations, which is Google  
7 or Amazon.

8 So the challenge is that more and more customers are  
9 bypassing Google, which is our marketing partner, and going  
10 directly to Amazon to begin their shopping experience. So  
11 while Amazon is incredibly predatory, we have no choice but to  
12 feed the monster that's trying to eat us.

13 **Q.** I'm now going to ask you -- I showed you your  
14 ratings-and-review platform for that showerhead. Are you  
15 involved in the ratings-and-review features at Build.com? Is  
16 that part of your job?

17 **A.** Absolutely.

18 **Q.** Okay. Who supplies the ratings-and-reviews software for  
19 Build.com?

20 **A.** Well, that's actually a multipart question because --  
21 you're saying Build.com the company or this specific Web site?

22 **Q.** I didn't realize they were different. Let's start with  
23 this Web site and then I'll ask more broadly for the company.

24 **A.** For this Web site, Bazaarvoice provides the review product  
25 for Build.com.

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1   **Q.**   Do you have a different ratings-and-review provider for  
2   any other part of your business?

3   **A.**   Yes. For our international business in the U.K. and in  
4   Canada, Build.ca and Homeoutlet.co.uk, soon to be Build.co.uk,  
5   we use a different software product called Magento, and built  
6   into the Magento platform is a rating-and-review system. We  
7   use that rating-and-review system.

8                 Furthermore, we recently acquired a company in Chicago,  
9   Illinois, called Power Equipment Direct. Power Equipment  
10   Direct built their own review system and uses that.

11   **Q.**   I'm going to come back to Build.com, but I want to follow  
12   up on those.

13                 On the sites where you use the ratings and review that's  
14   built into Magento, do you provide moderation of reviews?

15   **A.**   Yes.

16   **Q.**   How?

17   **A.**   The Magento tool itself automates much of the review  
18   process by screening for inappropriate language or content. So  
19   despite the sites reaching some level of scale, we expect the  
20   U.K. business to do 30 million pounds this year in revenues, it  
21   takes a part-time person today a couple hours a week to do the  
22   moderation.

23   **Q.**   So you do the moderation in-house?

24   **A.**   In-house.

25   **Q.**   Okay. You mentioned that for Build.com you use

1 Bazaarvoice's ratings and reviews. Did Build.com ever use  
2 PowerReviews for its software?

3 **A.** We did.

4 **Q.** When?

5 **A.** 2000 -- I don't recall exactly; but if memory serves me  
6 right, around 2006 -- 2005-2007, somewhere in that area.

7 **Q.** Do you remember ballpark how much PowerReviews charged you  
8 for their software?

9 **A.** It was free at the time.

10 **Q.** Did you ever change from PowerReviews to someone else?

11 **A.** My VP of marketing did, yes. He switched us from  
12 PowerReviews to Bazaarvoice.

13 **Q.** About what year?

14 **A.** '06-'07.

15 **Q.** And what was your understanding of the rationale for  
16 Build.com moving from PowerReviews to Bazaarvoice?

17 **A.** Well, the problem was, is that I didn't. I was a little  
18 frustrated with the decision, because we had a provider. It  
19 was serving us fine. It was a -- it was doing all the  
20 functionality that we believed we needed for reviews, but  
21 Bazaarvoice came in and sold us, I think it was just great  
22 salesmanship, a function of this dream of future of social  
23 commerce tools, as well as this idea of syndication where we  
24 would have all this great content syndicated to us from all of  
25 our distribution partners.

FRIEDLAND - DIRECT / FELDMAN

1       So it was against my wishes, we took a free product that  
2 was performing fine and put a paid product in its place that we  
3 saw no real meaningful impact from.

4       **Q.**     What do you mean that you saw no meaningful impact from?

5       **A.**     The function of having review software is important for  
6 all Web sites. If you're going to be in the eCommerce  
7 business, you should have some form of rating and reviews.  
8 There's many ways to do that. In this age with technology  
9 where it is, it's -- there's plug-ins and free review software  
10 that anybody can install on their own Web site.

11           PowerReviews not only provided us free software, but they  
12 also provided us also the moderation piece, which just saved us  
13 cost. So as far as -- as far as a provider goes, it's a  
14 commodity product for us and we traditionally look at that how  
15 do we derive cost out of that process rather than add cost.

16           Because beyond a certain threshold of reviews, once a  
17 product has a certain -- I think the last confidence test we  
18 had 13 to 18 reviews. The conversion rate -- getting the 13 to  
19 18 reviews sends the conversion rate up dramatically.

20           After you get to that point, you can add a hundred reviews  
21 and the incremental gains from those additional reviews are  
22 almost nil. You might as well turn off reviewing that product  
23 because you're not going to get any incremental lift or  
24 customer confidence beyond a certain point.

25       **Q.**     So how would you articulate the importance of syndication

FRIEDLAND - DIRECT / FELDMAN

1 of reviews to your business?

2 **A.** It's not important.

3 **Q.** Because?

4 **A.** Well, it never really worked. The syndication issue --  
5 the syndication opportunity was a little bit of stone soup from  
6 my perspective when they said, "Well, we're going to syndicate  
7 with all your manufacturer partners. You're going to get this  
8 great flow of reviews. It's a wonderful dream of you're just  
9 going to super-populate all of your products with reviews out  
10 of the box." Still today, years into this process, only  
11 20 percent of our products have reviews on them to give you an  
12 idea of the success of syndication.

13 Syndication, which was most frustrating to me, I ended up  
14 having a Bazaarvoice salesperson call me saying, "Can you  
15 introduce me to all your manufacturers?" Screwed up the  
16 relationship.

17 Got another call saying, "Could you reintroduce this new  
18 salesperson to manufacturers?" And at that point I said, "I've  
19 introduced you to Delta. I've introduced you to these guys.  
20 I'm not going -- I'm not going -- you're bringing me a  
21 stone-soup solution where you have this software platform that  
22 you're having me go out and do the selling for you. I refuse  
23 to continue to participate."

24 **Q.** Have you entered into discussions with any companies other  
25 than Bazaarvoice about providing ratings-and-reviews software

FRIEDLAND - DIRECT / FELDMAN

1 for your Build.com site?

2 **A.** Personally, no; but, yes, every year with Bazaarvoice we  
3 run a cost-benefit analysis based on what we're being charged  
4 currently by Bazaarvoice and what other provider is out there  
5 and whether it makes sense to either take it in-house or switch  
6 to a lower-cost provider.

7 **Q.** Do you know if Build.com has talked to Gigya?

8 **A.** We have spoken with Gigya.

9 **Q.** How about Reevoo?

10 **A.** I believe we've spoken with Reevoo as well, too.

11 **Q.** Okay. Over time have you observed any trends in the cost  
12 of ratings and review to Build.com measured by price per  
13 review?

14 **A.** Our price per review cost continues to fall, which justify  
15 our -- which marginally justify us sticking with Bazaarvoice as  
16 a provider.

17 **Q.** Has that changed at all since the acquisition of  
18 PowerReviews?

19 **A.** No.

20 **Q.** I want to ask you about other user-generated content on  
21 your Web site. I pointed you earlier to Q & A?

22 **A.** Yes.

23 **Q.** Do you buy that Q & A software from Bazaarvoice?

24 **A.** That's actually a funny story. So, embarrassingly enough,  
25 Bazaarvoice brought us the Q & A product. And Bazaarvoice

1 brings us a lot of products that we don't buy because they're  
2 constantly trying to sell us stuff. But we really liked the  
3 Q & A product, and we said, "We want this one. We'll -- we're  
4 interested."

5 And the price was so ridiculously stupid. They wanted to  
6 double our cost. We said, "You're crazy. We'll take an  
7 incremental lift for it, but what you're doing" -- they can't  
8 even moderate the reviews. They can't moderate the content  
9 because it's domain-specific knowledge.

10 So they wanted to just give us a system for some  
11 ridiculous price that allowed us to take customer service  
12 requests, review them, and post the answers to our own Web  
13 site. So we just said -- you know, we spent two weeks and  
14 built it ourselves probably at a cost of about \$10,000  
15 internally and have been using it ever since.

16 **Q.** Okay. Thank you.

17 I want to move from that to the ability to develop  
18 ratings-and-review capabilities in-house as distinct from  
19 Q & A.

20 If Build.com chose not to use an outside vendor for  
21 ratings and reviews, do you think it would be able to develop a  
22 ratings-and-reviews capability in-house?

23 **A.** In how many days? Yes.

24 **Q.** I think you said you used to do software engineering. How  
25 long do you think it would take Build.com to build an in-house

FRIEDLAND - DIRECT / FELDMAN

1 ratings-and-reviews platform that you found acceptable?

2 **A.** I would say, really enterprise Class 1, might take as long  
3 as a month if you really want to build it from scratch; but  
4 there's so many great plug-ins and software tools out there and  
5 open source review tool kits that we could use. I would say we  
6 could probably have something up and running in two weeks at an  
7 internal cost of maybe 20 to 30,000 I would imagine for  
8 something at our scale of a company.

9 **Q.** Okay. I'm almost done.

10 Has Bazaarvoice's acquisition of PowerReviews in your  
11 opinion affected Build.com in any way?

12 **A.** No, not at all.

13 **Q.** Do you believe that the acquisition significantly reduced  
14 Build.com's leverage in negotiating with Bazaarvoice?

15 **A.** Absolutely not.

16 **Q.** Why not?

17 **A.** Because it's all a decision of economics for us. This is  
18 a commodity -- a review system is a commodity product.  
19 Reviews -- the reviews are being provided from our customers  
20 and we have a constant flow of millions of customers and we own  
21 the review content. So you're really just talking about  
22 switching out a forum on the Web site with a little bit of  
23 JavaScript that will allow people to do star ratings and submit  
24 reviews, and then rebroadcast that information back out to our  
25 Web site. It's very, very simple technology.

1       The reason why we continue to stick with Bazaarvoice is,  
2 one, we've refused any price increases because we've told them  
3 we'll build it ourselves or go to a competitor; and, two, the  
4 moderation is convenient. The moderation -- the internal cost  
5 of doing the moderation at this point, based off the cost of  
6 Bazaarvoice today, it makes sense to keep using Bazaarvoice,  
7 especially as the review rates continue to go up and we can  
8 keep our costs relatively fixed. It's an economic decision.

9       **Q.**   Do you ever get solicited by third-party moderation  
10 services?

11      **A.**   Twice a day, yes. There's always BPO firms whether --

12      **Q.**   What does VPO [sic] mean?

13      **A.**   BPO, business process outsourcing firms, and usually  
14 overseas that want to do our data work. They offer to moderate  
15 our reviews. They offer to do all of the minutia work that  
16 many online retailers leverage these firms for, and review  
17 moderation is one of those services that they offer. And,  
18 yeah, I get -- at least company-wide we probably get at least  
19 one a day in some department.

20      **Q.**   Do you own any stock in Bazaarvoice?

21      **A.**   No, I do not believe so.

22      **Q.**   Did you ever own any stock in Bazaarvoice?

23      **A.**   I did own stock in Bazaarvoice.

24      **Q.**   How did that come about?

25      **A.**   So we were a Bazaarvoice customer, and a hedge fund

1 manager who I'm friends with named Mitchell Green said, "I'm  
2 doing a private placement of Bazaarvoice. I never owned  
3 stock -- I didn't own stock at this time personally. I'm  
4 buying stock from investors or existing investors and employees  
5 and would like you to participate in this -- in this vehicle."

6 I told him I didn't think it was going to work. I said,  
7 "The company doesn't make any money." He explained to me that  
8 they're going through this big SaaS boom and there was a huge  
9 opportunity to make --

10 **Q.** SaaS did you say?

11 **A.** Software as a service, SaaS.

12 And I said, "Well, relative to my net worth, I'll put in a  
13 fractional amount into this thing; and if you make me a great  
14 return, I'll consider doing more deals with you."

15 And, lo and behold, that was -- that was four or five  
16 years -- four years ago, five years ago, the company did go  
17 public. I was issued an allocation of stock where I made about  
18 a five-times return on my money; and immediately as I got  
19 control of the stock, based off the IPO price, I sold it as  
20 fast as I could.

21 **Q.** So you're not a shareholder today?

22 **A.** I'm not a shareholder today.

23 **MR. FELDMAN:** All right. Thank you. I don't have  
24 anything else. Thank you.

25 **MR. LEPORE:** Good morning, Your Honor. I'm Robert

FRIEDLAND - CROSS / LEPORE

1 Lepore.

2 THE COURT: Good morning.

3 MR. LEPORE: May I approach the witness, Your Honor?

4 THE COURT: Would you?

5 (Pause in proceedings.)

6 **CROSS-EXAMINATION**

7 BY MR. LEPORE:

8 Q. Good morning, Mr. Friedland. It's good to see you again.

9 We, of course, met a few months ago during your deposition.

10 A. Good to see you as well.

11 Q. Now, before we start talking about Build.com's use of  
12 ratings-and-review software, I want to touch a little bit more  
13 on your background.

14 You mentioned just a moment ago that you used to be an  
15 investor in Bazaarvoice; correct?

16 A. Correct.

17 Q. Now, I believe, just to dive into that a little more,  
18 there were two investments in Bazaarvoice; right? You were  
19 part of a hedge fund that was investing in Bazaarvoice?

20 A. Correct.

21 Q. And that was Eastern Advisors; is that right?

22 A. Correct.

23 Q. And then you also invested in this special purpose vehicle  
24 that you alluded to; correct?

25 A. Correct.

FRIEDLAND - CROSS / LEPORE

1   **Q.**   You invested around a hundred thousand dollars in that  
2   special purpose vehicle?

3   **A.**   Correct.

4   **Q.**   And at that time Bazaarvoice was still a private company  
5   so you couldn't just buy some shares through your broker;  
6   right?

7   **A.**   Correct.

8   **Q.**   And, so, you mentioned Mitchell Green?

9   **A.**   Correct.

10   **Q.**   Now, the Court may remember Mitchell Green. He's been on  
11   some emails that have come up earlier in the trial.

12           But for the record, at the time he was on Bazaarvoice's  
13   Board of Directors; correct?

14   **A.**   I don't know.

15   **Q.**   But you know he was a large investor in Bazaarvoice?

16   **A.**   No. I -- what's "large"? I don't know.

17   **Q.**   Well, Mr. Green and you were on the board of  
18   Eastern Advisors together; correct?

19   **A.**   No. I was not on the board of Eastern Advisors. I was an  
20   investor in Eastern Advisors.

21   **Q.**   Thank you, sir.

22           You were an investor in Eastern Advisors, and  
23   Eastern Advisors was a pre-IPO investor in Bazaarvoice?

24   **A.**   Correct.

25   **Q.**   And then you mentioned that after Bazaarvoice went public,

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1 you made about a five-times return; right?

2 **A.** Correct. Well, only because I sold it when I did,  
3 otherwise I would have made no return if I owned the stock as  
4 of a few months ago, but....

5 **Q.** Sure. So you kind of owe Mr. Green one a little bit?

6 **A.** I don't think I -- that's like saying I owe any -- I don't  
7 think I owe any hedge fund person. I don't think I owe anybody  
8 that does a service for me and takes an investment and makes a  
9 return anything personally.

10 **Q.** Well, sir, didn't you -- after you made that return, you  
11 rolled over that profit into another fund being run by  
12 Mr. Green; isn't that right?

13 **A.** That wasn't because I owe him anything. That's because he  
14 gave me a huge return on my investment. I expect another huge  
15 return out of this current fund. There's no -- he owes me.  
16 I'm an investor. If I invest in your company, you owe me. I  
17 don't you anything.

18 **Q.** Are you still invested with that fund with Mr. Green, sir?

19 **A.** I am.

20 **Q.** Is that fund Lead Edge Capital?

21 **A.** Correct.

22 **Q.** And do you know, sir, is Lead Edge Capital an investor in  
23 Bazaarvoice?

24 **A.** I'm not sure.

25 **Q.** You've never seen their portfolio or you just don't

1 remember?

2 **A.** I -- I know that -- I don't know exactly what their  
3 investment -- if they have an investment currently in  
4 Bazaarvoice. I know that Mitchell has, through some of his  
5 vehicles, had an investment in Bazaarvoice; but my  
6 investment -- my investment in Lead Edge today is nominal  
7 portion of my net worth, and any allocation, based off of what  
8 I can recall Lead Edge has been investing in recently, would be  
9 a fractional allocation, if that.

10 **Q.** Well, would it help refresh your recollection about  
11 Lead Edge's investments if I showed you a screen shot of  
12 Lead Edge's Web site that shows some of their portfolio  
13 companies?

14 **A.** I could actually go on my email and dig out my last  
15 statement from them and tell you exactly where -- how their  
16 portfolio is currently allocated.

17 **Q.** Well, why don't we move on for now.

18 Through your investment with Mitchell Green's fund, you  
19 continued to have a relationship with Mr. Green; right?

20 **A.** I, like hundreds of other investors, absolutely. Mitchell  
21 has a unique platform where he will often ask his investors for  
22 introductions into other companies so his -- part of his hedge  
23 fund strategy is, is he partners -- he takes C-level investors  
24 who can make introductions to some of these software service  
25 companies to help him add customers.

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1   **Q.** And, in fact, you've spoken with Mr. Green about this  
2 litigation; right?

3   **A.** I believe so.

4   **Q.** And you made jokes with him about the litigation?

5   **A.** Yes. Yes, I have.

6   **Q.** Uh-huh. And you also know Brett Hurt, right, the former  
7 founder and CEO of Bazaarvoice?

8   **A.** I do.

9   **Q.** And you've continued to explore venture capital  
10 opportunities with Mr. Hurt since he's left his CEO position?

11   **A.** I -- the last conversation that I had with Brett was  
12 involved -- it was involving an investment, but it was before  
13 this trial and before this event.

14   **Q.** Now, Mr. Friedland, from time to time during my  
15 questioning today I may be referring back to the deposition you  
16 took a few months ago in June. The transcript is there in  
17 front of you. Do you recall that testimony, sir?

18   **A.** I do.

19   **Q.** Okay. Great. I want to just go over a little  
20 housekeeping about that deposition up front.

21                 Before that deposition, you had a call with Bazaarvoice's  
22 lawyers; right?

23   **A.** I did.

24   **Q.** And in that conversation you discussed who from Build.com  
25 would be the company's representative to the deposition; right?

1     **A.**    Correct.

2     **Q.**    And during that call, there was a decision being made  
3       about whether it would be you or another individual at your  
4       company, Mr. Mario Magliozi; right?

5     **A.**    Correct.

6     **Q.**    And Mr. Magliozi is the one in charge of the relationship  
7       with Bazaarvoice?

8     **A.**    Correct.

9     **Q.**    And on that call you told Bazaarvoice's lawyers that  
10      Mr. Magliozi would be more familiar with the details of the  
11      Bazaarvoice relationship; right?

12    **A.**    Of the current relationship, not the historical  
13      relationship.

14    **Q.**    And I believe during direct testimony you mentioned that  
15      you personally hadn't been involved in evaluating alternatives  
16      to Bazaarvoice; is that correct?

17    **A.**    No, just by instruction of -- we have a process at Build  
18      to evaluate every one of our vendors every year to try and  
19      extract either costing or price concessions or whether or not  
20      we should -- whether the cost-benefit review platform makes  
21      sense.

22           We move vendors whenever we can't get the right price. We  
23      get the right price, some vendors we've kept for an extended  
24      period of time; but we have best -- but we like to think that  
25      we have best-in-market pricing with most of our vendors.

1   **Q.**   And Mr. Maglizzio, with respect to ratings and reviews,  
2   would have been the one who would have evaluated any other  
3   alternatives; right?

4   **A.**   Correct.

5   **Q.**   Bazaarvoice's counsel said they wanted it to be you at the  
6   deposition anyway; right?

7   **A.**   The discussion with Bazaarvoice's counsel was based off  
8   the history of the relationship with me and Bazaarvoice, that  
9   it made more sense for me -- and my understanding of software  
10   development, which Mario does not understand, that they  
11   requested that it would make more sense for me to be part of  
12   the hearing as opposed to Mario.

13   **Q.**   Right. So it was Bazaarvoice's attorneys who requested it  
14   be you and not Mr. Maglizzio?

15   **A.**   We had a pro-and-cons discussion of who should -- they had  
16   a pro-and-con discussions kind of over the phone of who should,  
17   and they said, "We would like it to be you, based off of the  
18   length of the relationship and your background in software  
19   development and your understanding of the technology behind  
20   it."

21   **Q.**   Now, sir, once you got to that deposition, do you recall  
22   you were under oath during that deposition, sir?

23   **A.**   Absolutely.

24   **Q.**   Just like you are here today?

25   **A.**   Correct.

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1   **Q.**   Did you tell the truth in that deposition, sir?

2   **A.**   I did.

3   **Q.**   Did you take that deposition seriously, sir?

4   **A.**   Yes.

5                 **MR. LEPORE:**   With Your Honor's permission, we have a  
6 short clip to play.

7                 Seth?

8                             (Videotape played as follows:)

9                 "Will the court reporter please now swear in the  
10 witness?

11                 **"THE REPORTER:**   Raise your right hand, please.

12                 "You solemnly swear that the testimony you're about  
13 to give in this matter will be the truth, the whole truth,  
14 and nothing but the truth so help you God?"

15                 **"THE WITNESS:**   I do."

16   **Q.**   Mr. Friedland, why did you wink there?

17   **A.**   It was a relatively playful environment. We were all  
18 chatting, and there wasn't any -- there was no deception  
19 involved. I was just winking. Maybe it was at Dominique. I  
20 don't even remember who specifically, but just being playful.

21                 **MR. LEPORE:**   Okay. Seth, let's put up DX1391.

22                 Your Honor, this document is already in evidence pursuant  
23 to the stipulation.

24   **Q.**   Mr. Friedland, this is the first document that's in the  
25 binder in front of you.

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1   **A.**   I'm looking at it right now.

2   **Q.**   Sir, this is the declaration that you signed in connection  
3   with this case; right?

4   **A.**   Correct.

5   **Q.**   And Bazaarvoice's lawyers sent you this declaration to  
6   sign; right?

7   **A.**   They did.

8   **Q.**   Now, let's take a closer look at item 8. In item 8 you  
9   write: (reading)

10                 "In the event that Bazaarvoice sought to increase  
11                 prices by 5, 10, or even 15 percent, I would end my  
12                 relationship with Bazaarvoice and develop a solution  
13                 in-house."

14                 But, in fact, sir, this signed statement isn't accurate;  
15                 is it?

16   **A.**   Well, if they -- here's the way we negotiate with our  
17         vendors, is we have to take a very, very hard line. And the  
18         Bazaarvoice solution, as it stands right now, if they're  
19         interested in doing a price increase with no added value, where  
20         we're not getting additional services or incremental, just  
21         we're going to take your platform and charge you more, then we  
22         would -- we would force them -- we would -- we wouldn't want to  
23         have to do it, but we've walked away from vendor relationships  
24         just purely off of principle that you're adding -- you're not  
25         adding any additional value and you're just adding costs for no

FRIEDLAND - CROSS / LEPORE

1 incremental reason. We would just walk away from the  
2 relationship just out of principle.

3 **Q.** So, sir, it's your testimony sitting here today that if  
4 Bazaarvoice increased your prices on ratings and reviews by  
5 only 5 percent, you would definitely end your relationship and  
6 move in-house?

7 **A.** The context would have to be whether the increase was part  
8 of any additional added value. If you came -- if somebody came  
9 to me and said, "My costs are going down, my cost to serve you  
10 has continued to go lower and I'm going to raise your prices,"  
11 on principle I would cancel that relationship. I would say  
12 "Your economy -- you're taking your economies of scale and  
13 punishing me with them and not adding any additional benefit?"  
14 Then I would end the relationship out of principle.

15 **Q.** So earlier during your direct testimony, I believe you  
16 alluded to the fact that Build.com's decision for what to do  
17 with ratings and reviews would be an economic decision; is that  
18 right?

19 **A.** Economic decision but vendor negotiations also involve a  
20 cat-and-mouse and play. And today the economic decision that  
21 we constantly weigh every single time we go into a contract  
22 review with Bazaarvoice is, we do the cost-benefit analysis of  
23 actually -- of actually seeing what is the cost-benefit  
24 analysis of the Bazaarvoice relationship.

25 And of all the vendors, including Bazaarvoice, as we

FRIEDLAND - CROSS / LEPORE

1 continue to scale our business dramatically, costs have  
2 actually been -- went down every single year as a percentage of  
3 the amount of volume that they process.

4 So we have been getting economies of scale out of our  
5 relationship in the sense of we don't pay -- we're paying less  
6 per review today than we were last year, than we were last  
7 year, than we were last year. If prices started to go up on a  
8 cost per review, then we would change the relationship because  
9 the volumes, we continue -- we continue to add more and more  
10 and more and more volumes.

11 **Q.** Sir, isn't it true that the reason you wrote that in this  
12 signed statement was that you just didn't want Bazaarvoice to  
13 know that you might have to accept a 5 percent price increase  
14 if they tried?

15 **A.** No. There's -- if Bazaarvoice came with 5 percent more  
16 value, then we would pay 5 percent. If they came with  
17 15 percent more value in the relationship or could offer us  
18 tools or services that added that incremental value and there  
19 was costs associated with those tools and there was development  
20 fees associated with those tools, we would take that as a price  
21 increase for added value.

22 We're not going to take a price increase for not adding  
23 any incremental value. So that is still a true statement.  
24 Would we take a 5 percent increase? Yes, but they would have  
25 to come with something that added value that justified a

5 percent increase. If it was just raising your prices, no, we would move from Bazaarvoice.

**Q.** Sir, if you could turn to page 81 in the deposition in front of you beginning at line 5.

A. Is that bookmarked? No?

Q. No.

**MR. LEPORE:** And, actually, Your Honor, I think this comes off better in a clip as well with your permission.

**THE COURT:** Go ahead.

**MR. LEPORE:** Clip Number 7, Seth?

(Videotape played as follows:)

"Q. Given those costs, if Bazaarvoice increased price by 5 percent, why would you switch to building in-house?

"A. Maybe that might be an empty threat, but that was my off-the-cuff when I made the declaration.

"It may take more than five. I wasn't going to publicly state that we would accept 5 percent price increase.

"So if the pricing model changed, I guess. Right now, we're getting -- from what I can ascertain, we're getting leverage to some degree. As volume goes up, pricing is remaining -- actually, by volume went down. If pricing started following that trend, maybe increased by 5 percent, now that would be a dollar amount worth chasing.

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1 "It's not even -- it's not even relative dollars.

2 It's absolute dollars. If absolute dollars start to rise  
3 too much, we would look. But there's people in-house that  
4 have -- on the software development that have been  
5 fighting us saying, "We should -- I could build this in a  
6 weekend. Let me do it. I will save the company money."

7 "So it's a constant battle. Perhaps not five. Maybe  
8 so. We would reevaluate it. If pricing went up  
9 5 percent, we would absolutely reevaluate whether we  
10 should do it in-house.

11 "I hate that the outcome for this deposition is for  
12 Bazaarvoice to feel like they could raise our prices."

13 **Q.** And, sir, in fact, the reason why you were concerned that  
14 it might be an empty threat that you would switch in response  
15 to a 5 percent price increase is because it would be costly for  
16 Build.com to build an in-house solution; right?

17 **A.** "Costly" is a relative term. Bazaarvoice is a fraction of  
18 a fraction of our marketing budget overall for the year. So in  
19 examining -- in making that cost-benefit decision, there is a  
20 switching cost that's involved in whether or not we would move  
21 from Bazaarvoice.

22 So there is a threshold, and I don't have the math in  
23 front of me to determine what it is of -- because today there's  
24 cheaper alternatives that provide the exact same service,  
25 Gigya, other providers that have came in and said, "We will

FRIEDLAND - CROSS / LEPORE

1 provide the service at a much, much lower cost."

2       But there is an opportunity cost of shifting software  
3 development resources over to saying, "Okay. We're going to  
4 save 20 -- \$10,000 annually in review costs and on the  
5 continuum than making the move to save that \$10,000."

6       So if it costs me -- it's an opportunity cost. So today,  
7 because the costs are so low relative to per review, it makes  
8 sense for us to continue the relationship.

9   **Q.** Okay. So let's focus first on in-house and then we'll  
10 talk about some of those third-party providers you mentioned.

11      You mentioned that -- you mentioned you don't have the  
12 math in front of you, but the company has thought about the  
13 math before when it's been evaluating this option; right?

14   **A.** Correct.

15   **Q.** And, in fact, the company's last estimate was that --  
16 well, let me back up for a second.

17      If Build.com switched to an in-house ratings-and-review  
18 solution, you'd also need to provide for moderation; correct?

19   **A.** Correct.

20   **Q.** And Build.com's last estimate for what it would cost to  
21 provide moderation would be that it would cost 30 to 40,000 per  
22 year; isn't that right?

23   **A.** That's a -- that's a spitball estimate, but....

24   **Q.** And that was the company's last spitball estimate?

25   **A.** Correct.

FRIEDLAND - CROSS / LEPORE

1   **Q.**   And that amount, 30 to 40,000 per year, is roughly what  
2   Build.com's paying to Bazaarvoice now anyway; right?

3   **A.**   Correct.

4   **Q.**   And that 30- to 40,000-dollar moderation cost per year,  
5   that wouldn't even include the cost of building the system  
6   itself; right?

7   **A.**   No. We would need to build the system in addition to --

8   **Q.**   Okay.

9   **A.**   -- or if we moved to the Magento platform, the system  
10   would come built in.

11   **Q.**   So let me make sure I have this right. In order to switch  
12   to in-house, Build.com would first have to either develop a new  
13   system or implement some other plug-in; right?

14   **A.**   Correct.

15   **Q.**   And then on an ongoing basis you'd have to spend on  
16   moderation?

17   **A.**   Correct.

18   **Q.**   And that moderation might run roughly what you're paying  
19   Bazaarvoice anyway?

20   **A.**   Correct.

21   **Q.**   Okay. Now, you mentioned also the consideration to  
22   switching to other third-party vendors, so let's talk about  
23   that.

24                  You mentioned, I think, in your answer that there are  
25   switching costs to moving to a new third-party vendor; is that

FRIEDLAND - CROSS / LEPORE

1 right?

2 **A.** Absolutely.

3 **Q.** And you have evaluated those switching costs before when  
4 you've been considering third-party alternatives; right?

5 **A.** Of course.

6 **Q.** And I think you concluded that it would take about a  
7 hundred man hours of internal Build.com effort to switch to a  
8 new vendor?

9 **A.** I don't recall that, but....

10 **Q.** Well, sir, why don't you take a look at page 62 of your  
11 deposition. It begins on line 25 and continues to page 63.  
12 And just see if that refreshes your recollection about what  
13 you've estimated in the past.

14 **A.** (Witness examines document.) Ah. Then a hundred man  
15 hours it was. Thank you for -- thank you for refreshing my  
16 memory there.

17 **Q.** Certainly.

18 And, so, for example, that hundred man hours, that would  
19 include things like using IT resources to suck the reviews out  
20 of Bazaarvoice; is that right?

21 **A.** Correct. Well, the reviews, they don't need to be sucked  
22 out. It's just an XML file, but then we'd need to  
23 export/import. You've used Excel, I imagine, this  
24 export/import process. Because the reviews are actually our  
25 content, which was a big part of why we continued the

FRIEDLAND - CROSS / LEPORE

1 relationship, but we own the review content.

2 **Q.** Okay. So there would be that export/import function.

3 You'd also need to move code on your Web site?

4 **A.** Absolutely. Yeah.

5 **Q.** And you'd need to move the code that triggers the email  
6 request to the customers to write a review?

7 **A.** We have email software that already supports that. We  
8 would just need to add a trigger or a form email that would go  
9 out that would perform that function.

10 **Q.** Okay. So that's what -- that hundred man hours, those  
11 sorts of things would be what they would be doing?

12 **A.** Yeah. It would be a combination of some software  
13 development, some project management, and some data work I  
14 would imagine. So a variety of -- a variety of people that do  
15 work on that and make up that rough hundred-hour spitball  
16 guesstimate.

17 **Q.** Well, I think the company also estimated that it might  
18 cost 20 or \$30,000 to change systems; is that right?

19 **A.** You would know better than me. I'm short on memory  
20 sometimes. I apologize.

21 **Q.** Okay. Well, I'll point you to something that might  
22 refresh your memory again.

23 If you go to page 28 of the deposition in front of you --  
24 actually, 29 is where it really starts, starting on line 1 and  
25 going through, say, line 10.

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1 Let me know when you finish reading that to yourself.

2 **A.** (Witness examines document.) Ah. Thank you. I  
3 appreciate it.

4 Yes. So 20 to 30,000 to change systems was Brandon --  
5 Brandon's estimate, which is my head of marketing. He's not a  
6 software developer; but when it came up, the last conversation  
7 was, "Why would we make" -- as any investment in business, you  
8 have to amortize that investment over time.

9 So if it was going to cost us, let's just say, \$20,000 to  
10 save -- or \$30,000 to save 10, it would take us a multiyear  
11 payback. There would be no big lift in revenue because it  
12 would be like-for-like services. Why would we spend time on  
13 this when we could spend time on things that would provide  
14 leverage to the business?

15 That was the -- that was the spirit of the discussion if  
16 it didn't come over as clear in the deposition.

17 **Q.** Uh-huh. Well, so, for example, I believe on direct  
18 examination you mentioned Reevoo, and you've considered Reevoo  
19 before; right?

20 **A.** Correct.

21 **Q.** And I believe you mentioned -- and I believe at the time  
22 you concluded that even if Reevoo offered you half the price  
23 that Bazaarvoice was offering you due to those costs, it  
24 wouldn't make sense to switch; is that right?

25 **A.** We would still not switch based off of the costs and the

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1 decreasing costs per review.

2 **Q.** Okay. So there are some costs to switching to in-house,  
3 and there are costs to switching to a new third-party vendor;  
4 but I'd like to talk just a little bit, to wrap up, about the  
5 value of ratings and reviews to your business.

6 **A.** Absolutely.

7 **Q.** Sir, I believe you mentioned on direct examination that  
8 Build.com believes it's beneficial to have ratings and reviews  
9 on its Web site; right?

10 **A.** It's essential.

11 **Q.** You'd say it's a core part of any eCommerce business;  
12 right?

13 **A.** There is a 30 percent lift associated with -- that we've  
14 measured on our own EB testing if you sell product that has  
15 zero reviews versus a product that has a handful of reviews.  
16 Even if they're negative, you sell more, oddly enough.

17 **Q.** And, so, given that, in the event that the price of  
18 ratings and reviews went up 5 percent, you wouldn't drop  
19 ratings and reviews from your Web site entirely; would you?

20 **A.** No.

21 **Q.** And if the price of ratings and reviews went up, you  
22 wouldn't close up Build.com's Web site and simply sell through  
23 Amazon; would you?

24 **A.** It's still a question but the answer, of course, is no.

25 **MR. LEPORE:** Thank you, Your Honor. I have nothing

further.

**THE COURT:** Thank you. Mr. Feldman?

**MR. FELDMAN:** Nothing, Your Honor.

**THE COURT:** You're excused. Thank you.

**THE WITNESS:** Thank you.

(Witness excused.)

**MR. SHER:** Good morning, Your Honor. Scott Sher.

**THE COURT:** Mr. Sher.

(Pause in proceedings.)

**MR. SHER:** Bazaarvoice would like to call its next witness, Mr. Timothy Katz.

**THE CLERK:** Please stand and raise your right hand.

TIMOTHY KATZ

called as a witness for the Defendant, having been duly sworn,  
testified as follows:

**THE WITNESS:** I do.

**THE CLERK:** Be seated.

Please state your full name and spell your name for the court reporter.

**THE WITNESS:** Hi. My name is Timothy Katz; T-I-M-

Last name is Katz, K-A-T-Z.

## **DIRECT EXAMINATION**

BY MR. SHER:

Q. Good morning, Mr. Katz.

**A.** Good morning.

1     **Q.** Mr. Katz, we talked previously and, obviously, you had  
2 your deposition taken several months ago in this matter.

3                  Can you tell the Court who your employer is?

4     **A.** My employer is Pacific Sunwear of California.

5     **Q.** And what's your title at Pacific Sunwear?

6     **A.** Director of eCommerce.

7     **Q.** And how long have you been the director of eCommerce?

8     **A.** I've been the director of eCommerce for one year.

9     **Q.** And what do you do as director of eCommerce?

10    **A.** I oversee the eCommerce business and the day-to-day  
11 operations of the eCommerce team.

12    **Q.** What is the eCommerce business?

13    **A.** We sell apparel and accessories on PacSun.com.

14    **Q.** And PacSun.com is the eCommerce Web site for  
15 Pacific Sunwear?

16    **A.** That is correct.

17    **Q.** And did you have any previous roles at Pacific Sunwear?

18    **A.** That is correct. I started in 2003 as a Web designer and  
19 developer, and then as well I was also the senior manager of  
20 operations before I was a director of eCommerce.

21    **Q.** And what were your responsibilities in those roles?

22    **A.** As a Web developer and designer, I was responsible for  
23 graphic design and HTML development of the Web site; and then  
24 as a senior operations manager, I was responsible for the  
25 day-to-day operations of the business.

1   **Q.**   And just for those of us who are Luddites, what's HTML  
2   design?

3   **A.**   It's a programming in which for the Internet to display  
4   content online.

5   **Q.**   Thanks.

6           And can you just provide me with -- the Court with an  
7   overview of Pacific Sunwear's business?

8   **A.**   Sure. We sell apparel and accessories to the youth  
9   market. Demographics range from 18 to 24. We sell brands  
10   rooted in surf and action sports, brands like Hurley and Volcom  
11   and Nike.

12   **Q.**   And those are all third-party brands?

13   **A.**   Those are.

14   **Q.**   Do you sell any Pacific Sunwear-branded merchandise?

15   **A.**   We do, however, not under the name Pacific Sunwear. Our  
16   proprietary goods range from several different categories. Our  
17   most prominent one is Bullhead Denim, which is a jeans  
18   category; and then we also have several other categories  
19   ranging from different apparel as well.

20   **Q.**   And how do you sell your products?

21   **A.**   We sell them in our brick-and-mortar stores and on  
22   PacSun.com.

23   **Q.**   And how many brick-and-mortar stores do you have?

24   **A.**   Approximately 637.

25   **Q.**   And when you said you also sell them online, is that

1 through the Pacific Sunwear dot-com Web site?

2 **A.** Correct.

3 **Q.** Any other Web site?

4 **A.** No. That's the only one.

5 **Q.** And who do you consider to be your primary competitors?

6 **A.** Primary competitors would be Tilly's and Zumiez as our  
7 most core competitors.

8 **Q.** I'm obviously getting older because I don't know who those  
9 are, but that's okay.

10 Are you familiar with the term "ratings and reviews"?

11 **A.** Yes, I am.

12 **Q.** And does Pacific Sunwear deploy ratings and reviews on its  
13 Web site?

14 **A.** Yes, we do.

15 **Q.** And in your role as head of eCommerce, as the eCommerce  
16 director, do you have responsibilities regarding the selection  
17 of a ratings-and-review vendor at Pacific sun?

18 **A.** Yes, I do.

19 **Q.** And does Pacific Sunwear use a third-party vendor for its  
20 eCommerce platform?

21 **A.** For it's eCommerce platform?

22 **Q.** ECommerce platform, yes.

23 **A.** Yes, we do.

24 **Q.** Okay. And who's that?

25 **A.** Demandware.

1   **Q.**   And when did you select Demandware to be your eCommerce  
2   platform provider?

3   **A.**   Late 2011.

4   **Q.**   And before 2011 did Pacific Sunwear have ratings and  
5   reviews on its Web site?

6   **A.**   We did not.

7   **Q.**   And when did you decide to start looking at ratings and  
8   reviews vendors?

9   **A.**   Early 2012.

10   **Q.**   And when you started looking for ratings and reviews  
11   vendors, Mr. Katz, who were you looking at primarily?

12   **A.**   We primarily looked at Bazaarvoice and PowerReviews.

13   **Q.**   And did you have an opportunity to evaluate the  
14   ratings-and-reviews solution offered by Bazaarvoice?

15   **A.**   Yes, I did.

16   **Q.**   And what was the outcome of that evaluation?

17   **A.**   We did not end up selecting Bazaarvoice.

18   **Q.**   Okay. And did you evaluate the ratings-and-reviews  
19   solution offered by PowerReviews?

20   **A.**   Yes, I did.

21   **Q.**   And what was the outcome of that?

22   **A.**   We did not select PowerReviews.

23   **Q.**   Was there a front-runner between PowerReviews and  
24   Bazaarvoice?

25   **A.**   Bazaarvoice.

1       **Q.** And you said that you ultimately did not choose to go with  
2 Bazaarvoice even though they were the front-runner. What  
3 happened?

4       **A.** We ended up selecting another vendor that we were going  
5 with for several different technologies that also offered a  
6 reviews-and-ratings package.

7       **Q.** And who was that?

8       **A.** Gigya.

9       **Q.** And when did you sign the agreement to use Gigya for  
10 ratings and reviews?

11      **A.** Mid-2012.

12      **Q.** So you said that you were looking at Gigya for several  
13 services. Can you explain to me, if you were leaning towards  
14 Bazaarvoice, how did you ultimately get to Gigya for ratings  
15 and reviews?

16      **A.** Sure. So we were using Gigya or selected Gigya for  
17 different social services, so the ability to sign in and  
18 register with a social network and also share content with  
19 social.

20           So we ultimately were made aware that Gigya provided a  
21 reviews-and-ratings technology that was tightly integrated with  
22 those two other services. So that led us to choose Gigya to  
23 power our reviews-and-ratings service as it was a more economic  
24 and desirable integration for Pacific Sunwear.

25      **Q.** And just for the Court's knowledge, what is social sign-in

1 exactly?

2 **A.** Social sign-in is the ability to log into a Web site with  
3 a social network account, such as Facebook.

4 **Q.** And why is that important to Gigya?

5 **A.** That --

6 **Q.** I'm sorry. And why is that important to Pacific Sunwear?  
7 Excuse me.

8 **A.** Got it. There's several reasons. One is it streamlines  
9 the process for logging in or registering on a Web site. So  
10 essentially there's fewer steps involved.

11 And, two, because of the nature of our demographic, as I  
12 mentioned, 18 to 24, that demographic is very keen and heavy  
13 users of social network. So they're more attracted to that  
14 type of option versus having to create an account or log in by  
15 themselves on our Web site.

16 **Q.** So is the value, then, that you believe social sign-in  
17 increases conversion and engagement?

18 **A.** That is correct.

19 **Q.** And did Bazaarvoice offer social sign-in?

20 **A.** No, they did not.

21 **Q.** And how about PowerReviews?

22 **A.** No, they did not.

23 **Q.** So you said it's a benefit to Pacific Sunwear to have one  
24 vendor for multiple components of your social commerce tools.  
25 Can you explain to the Court why it's important?

1       **A.**     From an operations standpoint, it means that we'd have  
2 less of a workload involved. So we only have one vendor to  
3 work with versus multiple.

4                 And then as well, from an integration standpoint, it  
5 streamlines the amount of time it takes to integrate that  
6 technology into our Web site.

7                 And then as well from a performance standpoint, by only  
8 having one third party to interface with, it will provide  
9 better performance and, therefore, as well better conversions  
10 because performance does impact conversion on an eCommerce Web  
11 site.

12       **Q.**     How does performance impact conversion?

13       **A.**     I mean, every second really does matter. So if a site is  
14 going slow, people are going to be more apt to bounce or leave  
15 our Web site. So the quicker service we can provide them, the  
16 more likely we're going to be able to convert a sale.

17       **Q.**     So if you were to purchase different products from  
18 different vendors, you think that that might have an impact on  
19 speed and performance of the Web site?

20       **A.**     Yes, I do.

21       **Q.**     And what's the basis for that belief?

22       **A.**     Research that I've reviewed and testing that we've done  
23 with our own third-party tools.

24       **Q.**     So getting back to Gigya's ratings-and-review solution,  
25 was it your conclusion that the Gigya rating-and-review

1 solution was better for Pacific Sunwear?

2 **A.** Yes.

3 **Q.** And what did Gigya charge for ratings and reviews to  
4 Pacific Sunwear?

5 **A.** It was an entire package deal, which was \$50,000.

6 **Q.** And how did that relate to Bazaarvoice's quote for ratings  
7 and reviews?

8 **A.** The Bazaarvoice quote was around \$94,000.

9 **Q.** So it was higher?

10 **A.** It was almost double.

11 **Q.** Okay. Can you tell me, are you familiar with the term  
12 "moderation"?

13 **A.** Yes, I am.

14 **Q.** And in the context of ratings and reviews, can you tell me  
15 what moderation is?

16 **A.** Moderation is a practice of reviewing reviews and specific  
17 content that consumers might leave within a review for the sake  
18 of determining the quality and impact to the brand.

19 **Q.** So moderation would be some sort of a filter to take away  
20 undesirable or improper reviews?

21 **A.** That is correct.

22 **Q.** And does Gigya provide moderation for Pacific Sunwear?

23 **A.** Not currently.

24 **Q.** Did you have the opportunity, when you were considering  
25 vendors, whether or not Gigya offered a same or similar service

1 for moderation than Bazaarvoice offered?

2 **A.** Yes, I did.

3 **Q.** And what was the conclusion?

4 **A.** We ended up going with the moderation service when we  
5 initially signed.

6 **Q.** From Gigya?

7 **A.** From Gigya, that is correct.

8 **Q.** Okay, great.

9 And was it -- was it, in your -- were there any  
10 differences, in your opinion, between the moderation service  
11 offered by Gigya and Bazaarvoice?

12 **A.** No.

13 **Q.** And how about between Gigya and PowerReviews?

14 **A.** No.

15 **Q.** Can you tell me if you're familiar with the term "data  
16 analytics"?

17 **A.** Yes.

18 **Q.** And in the context of social commerce and ratings and  
19 reviews, can you explain to the Court what data analytics are?

20 **A.** The ability to view very user-level demographic  
21 information about interactions with consumers and the different  
22 social integrations on our Web site.

23 **Q.** And does Gigya provide you with data analytics?

24 **A.** Yes, they do.

25 **Q.** And did you have the opportunity, when you were

1 considering vendors, to compare the data analytics software  
2 between Gigya and Bazaarvoice?

3 **A.** Yes, I did.

4 **Q.** And what was the result of that analysis?

5 **A.** They were pretty similar.

6 **Q.** And how about a similar comparison -- did you do a similar  
7 comparison between Gigya and PowerReviews for data analytics?

8 **A.** Yes, I did.

9 **Q.** And what was the result of that analysis?

10 **A.** It was the same. They were similar.

11 **Q.** So stepping back, since you've implemented Gigya as your  
12 ratings-and-reviews and social sign-in vendor, are you  
13 satisfied with the services that they provided?

14 **A.** Yes, I am.

15 **Q.** And specifically with regard to ratings and reviews, does  
16 Gigya satisfy the needs of Pacific Sunwear?

17 **A.** Yes, they do.

18 **Q.** So, you know, the Department of Justice has brought suit  
19 against Bazaarvoice in connection with the acquisition of  
20 PowerReviews; and in your role as eCommerce director, have you  
21 given any thought to that transaction and how it might affect  
22 your business?

23 **A.** Yes, I have, but I do not feel that it affects our  
24 business.

25 **Q.** And why not?

1       **A.** Well, number one, we're happy with the service that we  
2 have; and, number two, based off of the evaluations that we've  
3 done in the past, there wasn't a huge distinction between the  
4 services, as I mentioned. So I don't feel that it really has a  
5 material impact to others.

6              **MR. SHER:** Okay. Thanks.

7              I don't have any further questions, Your Honor.

8              **THE COURT:** Thank you.

9              **MR. COMENETZ:** Good morning, Your Honor. Aaron  
10 Comenetz for the United States.

11              **THE COURT:** Mr. Comenetz. Please proceed.

12                                  CROSS-EXAMINATION

13              **BY MR. COMENETZ:**

14       **Q.** Good morning, Mr. Katz.

15       **A.** Good morning.

16       **Q.** Mr. Katz, PacSun began using Gigya in September of 2012;  
17 correct?

18       **A.** That is correct.

19       **Q.** And before choosing Gigya, you also considered Bazaarvoice  
20 and PowerReviews; correct?

21       **A.** That is correct.

22       **Q.** But you did not consider a company called Reevoo; correct?

23       **A.** No, I did not.

24       **Q.** And you also did not consider a company called Pluck;  
25 correct?

1      **A.**    No, we did not.

2      **Q.**    All right. And you also did not consider a company called  
3                Lithium; correct?

4      **A.**    No, we did not.

5      **Q.**    All right. And you did not consider a company called  
6                Magento; correct?

7      **A.**    Not for reviews and ratings.

8      **Q.**    All right. And you didn't consider a company called  
9                Viewpoints; correct?

10     **A.**    No, I did not.

11     **Q.**    In fact, sir, you weren't even aware of those firms as  
12               possible providers of ratings and reviews when you were deposed  
13               in this matter a few months ago; correct?

14     **A.**    That is correct.

15     **Q.**    Now, when you chose Gigya over Bazaarvoice and  
16               PowerReviews, you were looking for a more simplistic  
17               ratings-and-reviews solution than what Bazaarvoice and  
18               PowerReviews offered; correct?

19     **A.**    That is correct.

20     **Q.**    And you wanted a more simplistic solution because you  
21               wanted a solution that would be easy for your customer  
22               demographic to use; correct?

23     **A.**    That is correct.

24     **Q.**    Now, one example of how Gigya is more simplistic than  
25               Bazaarvoice is that Bazaarvoice allows consumers to leave

1 ratings on specific attributes of a product and Gigya does not;  
2 correct?

3 **A.** That's correct.

4 **Q.** All right. Another example of how Gigya is more  
5 simplistic than Bazaarvoice is that Bazaarvoice offers more  
6 extensive customization capabilities than Gigya; correct?

7 **A.** That is correct.

8 **Q.** All right, sir. Now, you are PacSun's director of  
9 eCommerce; correct?

10 **A.** That is correct.

11 **Q.** And you're responsible for the day-to-day operations of  
12 the PacSun.com Web sites; right?

13 **A.** Correct.

14 **Q.** But you're not responsible for PacSun's Facebook page;  
15 correct?

16 **A.** That is correct.

17 **Q.** PacSun's Facebook page and all of PacSun's social media is  
18 run by PacSun's Marketing Division; correct?

19 **A.** Correct.

20 **Q.** And within PacSun there's one budget for PacSun's  
21 eCommerce Division and there's a separate budget for PacSun's  
22 Marketing Division; correct?

23 **A.** That is correct.

24 **MR. COMENETZ:** No further questions, Your Honor.

25 **THE COURT:** Thank you.

1 Any redirect?

2 **MR. SHER:** Nothing further, Your Honor.

3 **THE COURT:** Okay.

4 Thank you very much, Mr. Katz.

5 **THE WITNESS:** Thank you.

6 (Witness excused.)

7 **MR. SHER:** Hello again.

8 **THE COURT:** Welcome back.

9 **MR. SHER:** Bazaarvoice would like to call its next  
10 witness, Mr. Maki from Golfsmith.

11 **SAMUEL JAME MAKI,**

12 called as a witness for the Defendant, having been duly sworn,  
13 testified as follows:

14 **THE WITNESS:** Yes, I do.

15 **THE CLERK:** Be seated.

16 Please state your full name and spell your name for the  
17 court reporter.

18 **THE WITNESS:** Samuel Jame Maki; S-A-M-U-E-L, J-A-M-E,  
19 and then M-A-K-I the last name.

20 **DIRECT EXAMINATION**

21 **BY MR. SHER:**

22 **Q.** Good morning, Mr. Maki.

23 **A.** Good morning.

24 **Q.** Mr. Maki, can you tell the Court, who's your current  
25 employer?

1   **A.** I'm currently employed by Golfsmith International.

2   **Q.** And what's your title at Golfsmith?

3   **A.** I'm vice president of direct to consumer.

4   **Q.** And how long have you been in that role?

5   **A.** About six months.

6   **Q.** And what do you do in that role?

7   **A.** I drive our eCommerce business, which is our Web site, as  
8 well as our call center.

9   **Q.** And when you say the eCommerce business, can you explain  
10 what that is?

11   **A.** Sure. So that's our Web site Golfsmith.com and  
12 Golftown.com which is our Canadian entity; and within there  
13 it's, you know, managing the operations of the Web site, the  
14 fulfillment piece, the marketing side, and IT development for  
15 the Web site.

16   **Q.** And prior to that responsibility, did you have other jobs  
17 at Golfsmith?

18   **A.** Yeah. I've had increasing -- career path of increasing  
19 responsibilities from marketing manager to director of online  
20 marketing and to my current role with similar ownership of what  
21 I just spoke about just on a lower level.

22   **Q.** And you said that Golfsmith makes sales off its eCommerce  
23 site. Can you explain to the Court how Golfsmith makes sales?

24   **A.** Sure. Yeah, we have various online marketing channels,  
25 such as paid search, email marketing, social, affiliate

1 marketing, and then direct load, which is just traffic coming  
2 to our Web site from someone typing in our URL. So taking in  
3 that traffic and then creating the experience online so that  
4 someone could check out and complete a sale.

5 **Q.** And every afternoon on my way back from here back to the  
6 hotel I walk by a store Golfsmith. Is that also owned by the  
7 company that you work for?

8 **A.** Yeah. We have over a hundred stores in the U.S. and a  
9 little less than a hundred in Canada.

10 **Q.** Now getting back to the online portion, does Golfsmith use  
11 ratings and reviews?

12 **A.** We do.

13 **Q.** And who is your ratings-and-review provider?

14 **A.** It's provided by Bazaarvoice.

15 **Q.** And when did you sign up with Bazaarvoice?

16 **A.** It was late 2005, early 2006.

17 **Q.** And I think you have a special distinction with  
18 Bazaarvoice. You're their first customer; right?

19 **A.** That's correct.

20 **Q.** And what's the current status of your relationship with  
21 Bazaarvoice?

22 **A.** We're currently under agreement for their services.

23 **Q.** And what services do they provide you?

24 **A.** Right now we're using ratings and reviews, Q & A module,  
25 and then Stories.

1   **Q.**   And how often do you renegotiate a contract with  
2   Bazaarvoice?

3   **A.**   Typically it's every two years.

4   **Q.**   And before signing -- when was the last time you signed a  
5   contract with Bazaarvoice?

6   **A.**   It was late 2011, early 2012.

7   **Q.**   And before signing your most recent contract with  
8   Bazaarvoice, did you consider any other vendors for ratings and  
9   reviews?

10   **A.**   Yeah. We actually considered a company called Pluck,  
11   which is another Austin-based company.

12   **Q.**   And can you tell me a little bit about who Pluck is?

13   **A.**   Yeah. Pluck is a social commerce company owned by  
14   Demand Media, which is a much larger company, and Pluck  
15   specifically provides ratings and reviews, Q & A, a forum  
16   functionality, and a host of other pieces that all kind of tie  
17   together.

18   **Q.**   You said Q & A. Can you describe for the Court what Q & A  
19   is?

20   **A.**   I'm sorry. That's question and answer, which is analogous  
21   to the Q & A product that Bazaarvoice offers.

22   **Q.**   And you also mentioned forums. What is forums?

23   **A.**   They have a forum and a blog tool, which is all part of  
24   their platform.

25   **Q.**   And what are forums and blog tools?

1     **A.**    Sure. Yeah. A forum would be a message board where a  
2 user could go on and ask questions as well as, you know, other  
3 folks within the community.

4     **Q.**    And what kind of investigation did you undertake with  
5 regard to Pluck's offering?

6     **A.**    We did the full investigation, brought them in multiple  
7 times, had numerous calls and on-site visits -- them being in  
8 Austin, it was very easy for them to come over -- and went  
9 through the whole suite of products, and got all the way down  
10 to negotiating a contract.

11    **Q.**    So you got all the way down to negotiating a contract for  
12 a price with Pluck?

13    **A.**    That's correct.

14    **Q.**    And when you were doing this analysis, taking it back one  
15 step --

16    **A.**    Sure.

17    **Q.**    -- did you compare the ratings-and-review solution offered  
18 by Pluck with one offered by Bazaarvoice?

19    **A.**    Yes, we did.

20    **Q.**    Were you impressed with the ratings-and-review solution  
21 offered by Pluck?

22    **A.**    Yeah, I was very impressed. I remember, you know, after  
23 the first kind of pass of seeing the presentation of the actual  
24 experience and how they tied it all together, I was blown away.  
25 My team was blown away as well.

1     **Q.** When you say tie it all together, what were they tying  
2     together with ratings and reviews?

3     **A.** Sure. So at the time the Bazaarvoice products were  
4     somewhat separate, and when you log into one, you couldn't  
5     really go across to Q & A from ratings and reviews.

6                 And the Pluck platform kind of tied it all together  
7     because they built it all together with all the different  
8     pieces. So from a user experience, it was kind of one unified  
9     experience.

10    **Q.** And from a user experience, it was one unified experience;  
11    and what's the benefit of that in your opinion?

12    **A.** You know, so it's not disconnected. So when the user logs  
13    on, log into their account, they don't have to go back and log  
14    into the Bazaarvoice or the Pluck tools. Once you log in a  
15    site, you're logged into everything. And, you know, if you  
16    jump from ratings and reviews and pull up your profile on  
17    Q & A, it kind of all connected.

18    **Q.** And at the time Bazaarvoice didn't offer that?

19    **A.** No, it didn't.

20    **Q.** Did you tell Bazaarvoice that you were considering Pluck?

21    **A.** Yes, we did.

22    **Q.** And when you told Bazaarvoice that you were considering  
23    Pluck, did Bazaarvoice do anything in response?

24    **A.** Initially, no; but once they kind of knew the talks were  
25    going a little bit further, they renegotiated a lower price.

1   **Q.** And what was the price differential?

2   **A.** Prior to the negotiation, they were around \$190,000, and  
3 the final price that Bazaarvoice offered was around \$140,000.

4   **Q.** And what would have happened if Bazaarvoice didn't lower  
5 its price?

6   **A.** I definitely would have switched.

7   **Q.** You would have switched to?

8   **A.** I would have switched, correct.

9   **Q.** To?

10   **A.** To Pluck or to, you know, any other provider.

11   **Q.** Okay. And did you ever consider PowerReviews as a  
12 potential vendor for ratings and reviews?

13   **A.** Yes, I did.

14   **Q.** And when was that?

15   **A.** Initially early on kind of in the industry when ratings  
16 and reviews and the process was being developed, I looked at  
17 PowerReviews when I was at several different conferences, so  
18 going to the trade booth and asking them questions and kind of  
19 getting a demo of their product.

20   **Q.** And what was your impression?

21   **A.** I wasn't so really impressed. It looked like they were  
22 kind of following what Bazaarvoice was doing.

23   **Q.** And relative to what you now know about Pluck, how would  
24 you compare the solution offered by Pluck and that offered by  
25 PowerReviews?

1     **A.** I would say the Pluck experience and functionality was  
2 better or superior to PowerReviews.

3     **Q.** Thank you.

4                 And you're here, obviously, because -- in connection with  
5 the DOJ lawsuit against Bazaarvoice in connection with its  
6 acquisition of PowerReviews. And in your role as the head of  
7 online commerce at Golfsmith, do you believe that the  
8 acquisition has harmed Golfsmith in any way?

9     **A.** No, I don't.

10    **Q.** Okay. And do you believe that if Bazaarvoice were to  
11 raise its prices, you would have credible alternatives for  
12 ratings and reviews?

13    **A.** Yes, I do.

14                 **MR. SHER:** No further questions, Your Honor.

15                 **THE COURT:** Thank you.

16                 **MS. SCANLON:** Good morning, Your Honor.

17                 **THE COURT:** Ms. Scanlon, good morning.

18                             CROSS-EXAMINATION

19                 **BY MS. SCANLON:**

20    **Q.** Good morning, Mr. Maki. My name is Lisa Scanlon. Just a  
21 few questions for you.

22                 You talked just a moment ago about looking at Pluck in  
23 2011 when you were considering your Bazaarvoice contract; is  
24 that correct?

25    **A.** That's correct.

1   **Q.**   Okay. And Pluck offered you a lower price than you  
2   currently pay with Bazaarvoice; is that right?

3   **A.**   That's correct.

4   **Q.**   But one of the reasons you didn't switch was because of  
5   the internal costs of migrating to a new vendor; is that right?

6   **A.**   That's correct.

7   **Q.**   Now, I believe Golfsmith has also considered from time to  
8   time building in-house its ratings and reviews; is that right?

9   **A.**   I've looked at it a few times, yes.

10   **Q.**   Okay. And you determined that it would be a daunting  
11   task; is that right?

12   **A.**   The cost of having someone maintain and read all the  
13   reviews just isn't cost effective.

14   **Q.**   I want to talk to you a little bit about the value of  
15   ratings and reviews to Golfsmith.

16                 Golfsmith believes that to be a legitimate eCommerce Web  
17   site it needs ratings and reviews; is that right?

18   **A.**   That's correct.

19   **Q.**   And having ratings and reviews on a product page increases  
20   the ranking of Golfsmith's product pages and search engine  
21   results; is that right?

22   **A.**   That's correct.

23   **Q.**   Okay. And it's your opinion that online ratings and  
24   reviews have had a positive effect for sales involving  
25   Golfsmith's brick-and-mortar stores as well?

**A.** That's correct.

**Q.** And Golfsmith believes overall that ratings and reviews on its Web site provides a positive return on investments; is that right?

**A.** Yes, it does.

**MS. SCANLON:** Can I take one moment, Your Honor?

**THE COURT:** Yes.

(Pause in proceedings.)

**MS. SCANLON:** Nothing further. Thank you.

**THE COURT:** Thank you.

(Witness excused.)

**MR. LIDDIARD:** Good morning, Your Honor.

**THE COURT:** Mr. Liddiard.

**MR. LIDDIARD:** We would like to call our next witness, Mr. Krebs from Fruit of the Loom.

**THE CLERK:** Please raise your right hand.

**CHRISTOPHER K. KREBS,**

called as a witness for the Defendant, having been duly sworn,  
testified as follows:

**THE WITNESS:** I do.

**THE CLERK:** Be seated.

Please state your full name and spell your name for the court reporter.

**THE WITNESS:** My full name is Christopher K. Krebs.

My last name is spelled K-R-E-B-S.

1                   **DIRECT EXAMINATION**

2                   **BY MR. LIDDIARD:**

3                   **Q.**    Good morning, Mr. Krebs.

4                   **A.**    Good morning.

5                   **Q.**    Who's your current employer?

6                   **A.**    Fruit of the Loom.

7                   **Q.**    And what is your current job title?

8                   **A.**    I'm the chief information officer for Fruit of the Loom.

9                   **Q.**    And how long have you held that title?

10                  **A.**    Since December 2012.

11                  **Q.**    And just in general, what are your areas of responsibility  
12                  as the CIO?

13                  **A.**    I'm responsible for all information technology at Fruit of  
14                  the Loom.

15                  **Q.**    And did you have any previous roles or job titles at Fruit  
16                  of the Loom?

17                  **A.**    Previously I was the senior vice president of business  
18                  solutions at Fruit of the Loom. Essentially that's responsible  
19                  for all business applications.

20                  **Q.**    And how long did you hold that position?

21                  **A.**    Two or three years. I don't remember the exact.

22                  **Q.**    And how long have you worked for Fruit of the Loom?

23                  **A.**    A little over 10 years.

24                  **Q.**    And if you could just very briefly provide for the Court  
25                  an overview of what Fruit of the Loom is -- what business it's

1 in?

2 **A.** Fruit of the Loom's core business is the manufacturing of  
3 basic apparel.

4 **Q.** And does Fruit of the Loom have a Web site?

5 **A.** They do. It's [www.fruit.com](http://www.fruit.com).

6 **Q.** Are you familiar with the term "ratings and reviews"?

7 **A.** I am.

8 **Q.** And just what are ratings and reviews?

9 **A.** It's a way to engage with consumers to, you know,  
10 understand how they like the product using some kind of  
11 rating system.

12 **Q.** And does Fruit of the Loom use ratings and reviews on it's  
13 [Fruit.com](http://Fruit.com) Web site?

14 **A.** We do.

15 **Q.** And when did Fruit of the Loom first employ ratings and  
16 reviews on its Web site?

17 **A.** I think sometime in 2011.

18 **Q.** And at that time was the [Fruit.com](http://Fruit.com) Web site an eCommerce  
19 site?

20 **A.** Initially, no. It was more of a brand site.

21 **Q.** When you say "a brand site," what do you mean?

22 **A.** More static site. Just featuring our basic products.

23 **Q.** And at that time in 2011 did Fruit of the Loom select a  
24 third-party rating-and-review provider?

25 **A.** We did.

1   **Q.** And as the senior vice president of business solutions at  
2   that time, were you involved in the selection process?

3   **A.** I was.

4   **Q.** And as part of that selection process, did Fruit of the  
5   Loom also consider building an internal in-house solution for  
6   ratings and reviews?

7   **A.** Briefly.

8   **Q.** You didn't look at it for very long?

9   **A.** No, I didn't.

10   **Q.** Did you do any estimates to determine how much it would  
11   cost Fruit of the Loom to do an internal build?

12   **A.** Not really. We knew we didn't want -- we didn't want to  
13   build it.

14   **Q.** And who did Fruit of the Loom ultimately select in 2011 as  
15   its provider of ratings and reviews?

16   **A.** PowerReviews.

17   **Q.** And at some point after that, I take it the  
18   rating-and-reviews functionality from PowerReviews went onto  
19   the Fruit.com Web site; correct?

20   **A.** That's correct.

21   **Q.** And then at some point after that, did Fruit of the Loom  
22   decide to launch an eCommerce Web site?

23   **A.** We did.

24   **Q.** And was that Web site also Fruit.com?

25   **A.** It was, uh-huh.

1       **Q.** And when did that happen?

2       **A.** That was planned and did launch for the Olympics in 2012.

3       **Q.** And when Fruit of the Loom made a decision to start  
4 selling its products online, did Fruit of the Loom select an  
5 eCommerce platform or vendor?

6       **A.** We did. We selected Amazon.

7       **Q.** Amazon Webstore?

8       **A.** Amazon Webstore, uh-huh.

9       **Q.** And after selecting Amazon Webstore in the summer of 2012,  
10 did Fruit of the Loom decide to no longer use PowerReviews as  
11 its rating-and-review provider?

12      **A.** We did.

13      **Q.** And did Amazon Webstore offer a rating-and-review feature  
14 on its Amazon Webstore platform?

15      **A.** Yes, they do.

16      **Q.** And if Amazon had not offered a rating-and-review feature,  
17 would you have terminated your agreement with PowerReviews?

18      **A.** Probably not.

19      **Q.** And were you involved in the decision to terminate your  
20 relationship with PowerReviews in connection with the selection  
21 of Amazon as its eCommerce provider?

22      **A.** I was involved trying to terminate the current contract.

23                   **MR. LIDDIARD:** Your Honor, if I may approach the  
24 witness.

25                   **THE COURT:** Please.

1 (Pause in proceedings.)

2 **MR. LIDDIARD:** Candy, if you can call up DX1418.

3 **Q.** Mr. Krebs, I've put on the big screen, and you have it in  
4 front of you, it's an email. And do you recognize who Gary  
5 Rothman is?

6 **A.** Yes, I do.

7 **Q.** And who is he?

8 **A.** He was one of our directors on our direct consumer  
9 business or eCommerce business.

10 **Q.** And did he send this email out at your direction in August  
11 of 2012?

12 **A.** He did.

13 **Q.** And does the email reflect Fruit of the Loom's  
14 notification to PowerReviews that it no longer needed  
15 PowerReviews as a rating-and-review provider?

16 **A.** It does.

17 **Q.** And in the email, PowerReviews is informed: (reading)

18 "We are no longer in need of the service and we would  
19 like to end the agreement."

20 Do you see that?

21 **A.** I do.

22 **Q.** And it goes on to say that: (reading)

23 "We are using the services of Amazon Webstore  
24 platform for our eCommerce sites, which comes equipped  
25 with ratings/review application."

1       Do you see that?

2     **A.** I do.

3     **Q.** And it goes on to say that: (reading)

4                 "We are happy with the results and will continue to  
5                 use Amazon's Web platform for the foreseeable future."

6       Do you see that?

7     **A.** I do.

8     **Q.** And at that particular point in time, in August of 2012,  
9       was Fruit of the Loom happy with the rating-and-review  
10      functionality that was provided by Amazon's Webstore eCommerce  
11      platform?

12    **A.** We were.

13    **Q.** And as you sit here today as the chief information officer  
14       for Fruit of the Loom, are you still satisfied with the  
15       rating-and-review functionality that is provided by Amazon  
16       Webstore?

17    **A.** We are.

18    **Q.** As the chief information officer at Fruit of the Loom, do  
19       you have any concerns with Bazaarvoice's acquisition of  
20       PowerReviews?

21    **A.** I didn't.

22    **Q.** And in your business judgment as the CIO of Fruit of the  
23       Loom, has the acquisition of PowerReviews by Bazaarvoice caused  
24       any harm to Fruit of the Loom?

25    **A.** It has not.

**MR. LIDDIARD:** I have no further questions. Thank you.

## **CROSS - EXAMINATION**

**BY MS. SCANLON:**

**Q.** Good morning, Mr. Krebs.

**A.** Good morning.

**Q.** You were just asked about the use of Amazon Webstore by Fruit of the Loom. Is it right that the Amazon Webstore provides the eCommerce functionality for Fruit.com?

**A.** Yes, it does.

**Q.** And does the Amazon Webstore also do product fulfillment for Fruit.com?

A. Yes, for some of those sites it does for us.

**Q.** And product fulfillment, in this instance, means that Amazon ships your product to the consumer and receives the payment for the product; is that right?

A. Yes.

**Q.** Now, Fruit of the Loom didn't change strategies and launch eCommerce through the Amazon Webstore because of ratings and reviews: correct?

A. That's correct.

**Q.** Okay. And Fruit of the Loom didn't change strategies and launch eCommerce through the Amazon Webstore because of a price increase on ratings and reviews by PowerReviews; is that correct?

1     **A.**   That's correct.

2     **Q.**   Okay. Without getting into specific numbers, is it fair  
3    to say that sales through Fruit.com are a small percentage of  
4    Fruit of the Loom's overall business?

5     **A.**   That's safe to say.

6     **Q.**   Mr. Liddiard asked you about in-house during his  
7    examination. Do you recall that?

8     **A.**   Uh-huh.

9     **Q.**   When Fruit of the Loom looked at going in-house, you  
10   determined pretty quickly that it didn't make sense for Fruit  
11   of the Loom; right?

12    **A.**   That's correct.

13    **Q.**   And this is for ratings and reviews.

14       And it wasn't a good use of Fruit's development time; is  
15   that right?

16    **A.**   Uh-huh, that's correct.

17           **MS. SCANLON:** Just a moment, please.

18                   (Pause in proceedings.)

19           **MS. SCANLON:** Nothing further, Your Honor.

20           **THE COURT:** All right. Mr. Liddiard?

21           **MR. LIDDIARD:** I have nothing.

22       I just would like to -- I know that DX1418 is not part of  
23   the narrowed stipulation of documents that were deemed  
24   admissible without use in court. This particular document was  
25   on our initial trial exhibit list, and I'd move it into

PROCEEDINGS

1 evidence at this time if there's no objection.

2 **MS. SCANLON:** No objection.

3 **THE COURT:** All right. Admitted.

4 (Defendant's Exhibit DX1418 received in evidence)

5 **MR. LIDDIARD:** Thank you.

6 **THE COURT:** Okay. Mr. Krebs, thank you very much.

7 **THE WITNESS:** Yes, sir.

8 (Witness excused.)

9 **THE COURT:** And why don't we take our ten-minute  
10 break.

11 (Recess taken at 9:25 a.m.)

12 (Proceedings resumed at 9:35 a.m.)

13 **THE COURT:** Please, be seated.

14 **MR. RUBINSTEIN:** Hi, Your Honor.

15 **THE COURT:** Good morning.

16 **MR. RUBINSTEIN:** At this time we do not have any  
17 further live witnesses. We have witnesses that are flying in  
18 to appear tomorrow.

19 But we would like to present a couple of the video  
20 depositions that we've brought. So let me -- we have a couple.  
21 The first is going to be Webcollage.

22 There are a couple of exhibits discussed in the video,  
23 that I've handed up to you.

24

25

1 (Videotape was played as follows:)

2 "Q. So, Mr. Matthews, can you tell me where you currently  
3 work.

4 "A. I'm the CEO of Webcollage.

5 "Q. And how long have you held the position of CEO of  
6 Webcollage?

7 "A. Just under four years.

8 "Q. So can you tell me what business Webcollage was  
9 engaged in?

10 "A. Yeah. We syndicate sales and marketing content on  
11 behalf of brands to the retailing websites where those  
12 products are sold online.

13 "Q. Okay. Can you tell me, you said that you syndicate  
14 content. What does it mean that you syndicate content?

15 "A. As an example, we would take all of Sony's videos,  
16 testimonials, reviews, features, advantages, documents,  
17 and put those on Best Buy's product pages so when we, as  
18 consumers, are shopping for a Sony product at Best Buy we  
19 get the benefit of all the sales and marketing material  
20 from the manufacturer integrated to the retailers'  
21 websites. That service is what I provide, is the pipes  
22 between Sony and Best Buy, as an example.

23 "Q. Okay. And in that example, Sony is a customer of  
24 Webcollage?

25 "A. Sony pays us. Retailers don't pay us. There is no

1 remuneration from a retailer to Webcollage. They receive  
2 the content for free.

3 "Q. And Sony, then, is not a retailer in that instance.  
4 What would you consider Sony to be in that instance?

5 "A. A brand.

6 "Q. A brand?

7 "A. Uh-huh.

8 "Q. So you went through a number of specific types of  
9 items that Webcollage could syndicate from a brand to a  
10 retailer such as Best Buy.

11 "Can you describe more generally, what do you  
12 consider that type of content to be that you would deliver  
13 from a brand to a retailer?

14 "A. Unstructured sales and marketing content that's  
15 additive to what a retailer has on their website.

16 "Q. And can you tell me, when did Webcollage start  
17 syndicating content from brands to retailers?

18 "A. Approximately nine years ago.

19 "Q. Approximately nine years ago.

20 "Are you familiar with the term 'products ratings and  
21 reviews'?

22 "A. Sure.

23 "Q. What is your understanding of the term 'products  
24 ratings and reviews'?

25 "A. My understanding is at Toys R Us, I as a consumer

1           might look at what people have rendered as an opinion or  
2           a -- an opinion on what they felt the product was, did it  
3           work, did it not work, and I might look at that as a point  
4           of reference before I purchase or even after I purchase.

5         **"Q.** When you say 'people,' who are you referring to, the  
6           people who leave reviews?

7         **"A.** Customers who are shopping for products or  
8           researching products on Toys R Us.

9         **"Q.** Does Webcollage syndicate product ratings and  
10           reviews?

11         **"A.** We do.

12         **"Q.** Do you market the syndication services for products  
13           ratings and reviews?

14         **"A.** No. They're another content type. Webcollage is  
15           agnostic to any content type. As long as it's legally  
16           owned by the brand and the permission is given by the  
17           brand, we can't publish -- I don't change the reviews, I  
18           just pass the reviews through from a brand who owns them  
19           to where those products are sold and associated online.

20         **"Q.** So can you tell me, for whom do you syndicate  
21           content?

22         **"A.** Approximately 300 companies. Ones as large as  
23           Procter & Gamble, Sony and Samsung, various high-tech  
24           companies and lots of smaller ones.

25         **"Q.** And you said approximately how many brands do you

1 syndicate content for?

2 "A. It's over 700. It's 778, is probably the exact  
3 number.

4 "Q. And for the, you said, approximately 700 brands for  
5 whom you have relationships with, where do you syndicate  
6 that content to?

7 "A. To more than 330 online retailers that are authorized  
8 to sell those brands' products online.

9 "Q. How hard would it be for you to syndicate ratings and  
10 reviews?

11 "A. I do it now.

12 "Q. And how about for those customers who you currently  
13 don't do it now for?

14 "A. If they had them and legally owned them I could.  
15 There's not a technical impediment or a legal impediment  
16 for me to do it.

17 "Q. Can you tell me who your retail customers are?

18 "A. I could send you a list, but it's the top hundred  
19 online retailers in, you know, various countries around  
20 the world. It's a voluminous list.

21 "Q. Are you familiar with the term 'IR500'?

22 "A. Sure.

23 "Q. I'm going to introduce another exhibit, 332. So,  
24 Mr. Matthews, you've been handed what's just been marked  
25 as Defendant's Exhibit 332, which I will represent to you

1       is a report from the IR500 database listings IR500  
2       retailers who list you as a vendor.

3                 "Can you confirm that you have syndication  
4       relationships with the companies that are listed there?

5         **"A.** Yes.

6         **"Q.** What sort of content do you syndicate for the  
7       retailers that are listed there?

8         **"A.** I'd have to look at how many vendors we have live.

9       In some cases it may be 30 or 40 different brands that we  
10      syndicate content to, and it might be 10- or 12,000 SKUs  
11      of different contents and different variants of that  
12      content.

13         **"Q.** You've now been handed Defendant's Exhibit No. 333,  
14      which I'll represent to you is an image of the retailers  
15      listed as syndication partners on your website. Have you  
16      seen that page before?

17         **"A.** I have.

18         **"Q.** And can you verify for me that the information in the  
19      document is accurate to the best of your knowledge?

20         **"A.** Yes.

21         **"Q.** And it was created in the ordinary course?

22         **"A.** Yes.

23         **"Q.** Can you confirm with me that Webcollage has  
24      syndication relationship with the retailers listed in the  
25      image?

1       **"A.** Yes.

2       **"Q.** What sort of content do you syndicate to these  
3           retailers?

4       **"A.** A huge variant, to something that might be as small  
5           as an image, to might be videos, it might be -- there are  
6           literally 14 to 15, probably, different substrates of  
7           content types. It's whatever the manufacturer has that's  
8           incremental to the retailer, we'll syndicate that into  
9           that retailer.

10      **"Q.** Do you syndicate for any of those retailers' products  
11           ratings and reviews?

12      **"A.** We do.

13      **"Q.** And to the extent that you do not currently syndicate  
14           ratings and reviews for any of the retailers listed there,  
15           would you be able to do so?

16      **"A.** Yes.

17      **"Q.** Why do customers engage you for syndication?

18      **"A.** Because solving the problem of Sony having 3,000  
19           products and 14,000 assets, to integrate all of those  
20           products and assets content at 200 retailers is not a job  
21           that you want to do manually. You hire me as a service  
22           and I take care of managing those assets and the  
23           publication and syndication of those assets to authorized  
24           retailers for Sony.

25      **"Q.** And do retailers, likewise, get benefit from the

1 syndication?

2 "A. Yeah, absolutely. So we do AB testing all the time  
3 where we -- in Wal-Mart's case we turned all of our  
4 content off and then measured the increase in sales solely  
5 due to the syndicated content, and we increased sales by  
6 more than 10 percent for Walmart based on the content that  
7 syndicate from the brands into Walmart.com. And we've  
8 done more than 50 of those tests.

9 "Q. In order to achieve syndication between a brand and a  
10 retailer, what relationships do you need to have in order  
11 to do so?

12 "A. Business or technical?

13 "Q. Business.

14 "A. Business relationships, I need a contract from the  
15 manufacturer that identifies what products they want to  
16 have us syndicate, and then I need a list of authorized  
17 retailers that that brand wants that content to go to.  
18 And that's, basically, the contract that we would write  
19 with a brand.

20 "Q. And when you build a new connection between a source  
21 and a destination, do you have to manually match up the  
22 products?

23 "A. No. It's a program process that we get feed from the  
24 retailers, which builds a massive database of products  
25 available. And then we have algorithms that we've written

1           that go through and do it automatically.

2       **"Q.** And just again, I don't think I heard you before, but  
3           who owns this content that you're syndicating?

4       **"A.** The brands own it. I do not own the content.

5       **"Q.** One of the types of content that we have been talking  
6           about are ratings and reviews. In your understanding,  
7           what do customers use products ratings and reviews for?

8       **"A.** For reassurance that the purchase that they make has  
9           other people's opinion respected. And I think it's a  
10          consideration in someone's decision cycle that you would  
11          look at what other people thought of that product.

12       **"Q.** And can you tell me, have you ever syndicated content  
13          from or to a customer who uses an in-house platform for  
14          ratings and reviews?

15       **"A.** Yes.

16       **"Q.** If a brand customer requests that you syndicate its  
17          ratings and reviews to a retailer, could Webcollage do  
18          that?

19       **"A.** Yes.

20       **"Q.** And how long would that take?

21       **"A.** Seconds. It's just inputted into our system and it  
22          goes live at a retailer."

23           **MR. RUBINSTEIN:** Your Honor, I believe the Department  
24          of Justice has some counter-designations to play.

25           **THE COURT:** Okay.

1           **MR. BONANNO:** Your Honor, may I approach?

2           **THE COURT:** Sure.

3 (Videotape was played as follows:)

4           **"Q.** Okay. You were going to say something.

5           **"A.** All I said is that we don't syndicate ratings and  
6 reviews for every customer. If they have them available  
7 and if they're legally owned I do it. But it's not -- I  
8 just didn't want to lead you to think we do it for every  
9 customer. It's just a -- we're not specific content type.  
10 If they have it we'll syndicate it.

11           **"Q.** And can you tell me, have you ever syndicated content  
12 from or to a customer who uses an in-house platform for  
13 ratings and reviews?

14           **"A.** Yes.

15           **"Q.** Do you know for how many?

16           **"A.** Probably three or four customers we have that we've  
17 syndicated ratings and reviews for.

18           **"Q.** Have you ever worked directly with an outside ratings  
19 and reviews vendor in order to syndicate content?

20           **"A.** Yes.

21           **"Q.** Can you provide me an example of that?

22           **"A.** You mean show you it online, yes. Expo TV,  
23 Bazaarvoice, those would be the two that we've actually  
24 syndicated reviews for.

25           **"Q.** Can you tell me about your partnership with Expo TV

1 for video reviews.

2 "A. They use our -- Expo TV uses our platform to  
3 syndicate video reviews for customers that they have  
4 contracts for, and we provide those video reviews at  
5 websites that they can't get to.

6 "Q. And are you familiar with the syndication services  
7 provided by Bazaarvoice?

8 "A. Yes.

9 "Q. And how would you describe the way those services  
10 compare, the ones at Bazaarvoice, to the ones that are  
11 provided by Webcollage?

12 "A. I actually don't know. I just know they syndicate  
13 ratings and reviews, but I don't know enough to make a  
14 declarative statement.

15 "Q. Do you know of any instances in which both Webcollage  
16 and Bazaarvoice competed to sell syndication services to  
17 customers?

18 "A. No.

19 "Q. Mr. Matthews, I only have a few follow-up questions,  
20 and then we'll hopefully be quick and get you out of here.

21 "You talked about the product that your company  
22 sells, but we never discussed or you never were asked what  
23 the name of it was. Is the product that you sell called  
24 the Webcollage Content Publisher?

25 "A. Content Publisher is a product that we use to

1 syndicate content.

2       **"Q.** Is it fair to characterize the Content Publisher as a  
3 do-it-yourself application that enables brands to publish  
4 information about their products to retailers?

5       **"A.** Yes.

6       **"Q.** So your company Webcollage doesn't provide the  
7 content, your customers provide their own content; is that  
8 fair to say?

9       **"A.** Yes. I don't create any content. I'm just the pipes  
10 between a brand and a retailer.

11       **"Q.** Is it fair to say that Webcollage is not in the  
12 business of providing ratings and reviews software  
13 services to customers?

14       **"A.** It is not our primary business.

15       **"Q.** Do you offer any ratings and reviews system or  
16 functionality to your customers?

17       **"A.** No.

18       **"Q.** If Webcollage had ever competed head to head with  
19 Bazaarvoice to offer a customer ratings and review  
20 software or related service or syndication, would you be  
21 aware of that?

22       **"A.** Yes.

23       **"Q.** Do you know how many customers use Webcollage to  
24 syndicate ratings and reviews content to retailers?

25       **"A.** Approximately three or four.

1       **"Q.** And do you know roughly how many reviews each of  
2 those customers syndicates to their retailers?

3       **"A.** Less than 50 per customer.

4       **"Q.** On an annual basis?

5       **"A.** Or in totality.

6           **"UNIDENTIFIED SPEAKER:** Did you say 50 or 15?

7           **"THE WITNESS:** Five-oh.

8           **"UNIDENTIFIED SPEAKER:** Five-oh.

9       **"Q.** Meaning each of those customers for whom you  
10 syndicate ratings and reviews have about 50 total ratings  
11 and reviews on their websites?

12       **"A.** Let me be specific. So in Procter & Gamble's case  
13 they pay Expo TV to build these video reviews. I'm only  
14 given 50 to 75 to syndicate, not the whole library,  
15 because most of them exist and live at  
16 Procter & Gamble.com. So I probably have syndicated 50  
17 video reviews for Procter & Gamble across their 3,000  
18 products that I syndicate content for.

19       **"Q.** And for the other customers, do you recall what types  
20 of reviews you're syndicating? Are those also video  
21 reviews?

22       **"A.** It's mostly video reviews; just a handful of textual  
23 reviews.

24       **"Q.** Has Webcollage ever competed head to head with  
25 PowerReviews to offer ratings and review software or

1 related service?

2 "A. No.

3 "Q. I have a follow-up to his follow-up.

4 "Do you have any -- have any customers asked you to  
5 syndicate ratings and reviews in addition to those three  
6 to four customers that you've talked about?

7 "A. No."

8 **MR. RUBINSTEIN:** Your Honor, we just have a short  
9 counter clip to play.

10 (Videotaped testimony resumed as follows:)

11 "Q. Can you tell me about your partnership with Expo TV  
12 for video reviews.

13 "A. Expo TV uses our platform to syndicate video reviews  
14 for customers they have contracts for. And we provide  
15 those video reviews at websites that they can't get to.

16 "Q. And what is a video review?

17 "A. So that might be Scott Matthews giving a testimonial  
18 about my Furbee, why it's so fantastic. And just like a  
19 textual review, it's a video review.

20 "Q. And what benefit do you get from the relationship  
21 with Expo TV?

22 "A. Nothing monetarily. It's more of a value add for  
23 Procter & Gamble, who uses Expo TV, who wants those user  
24 reviews at Walmart. And it's really value to  
25 Procter & Gamble, is why I -- to my customers.

1       **"Q.** When you say Procter & Gamble, is Procter & Gamble a  
2 customer of Webcollage?

3       **"A.** And Expo TV.

4       **"Q.** Is it fair to say that Webcollage is not in the  
5 business of providing ratings and reviews software  
6 services to customers?

7       **"A.** It is not our primary business.

8       **"Q.** Is it any part of your business?

9       **"A.** Yes.

10      **"Q.** As far as what you've explained before in the  
11 deposition?

12      **"A.** Yes.

13      **"Q.** Do you know how many customers use Webcollage to  
14 syndicate ratings and reviews content to retailers?

15      **"A.** Approximately three or four.

16      **"Q.** Do you know who those customers are?

17      **"A.** I could find the names of those customers.

18      **"Q.** But you don't know them off the top of your head?

19      **"A.** Yeah, I could name a few. Procter & Gamble, LG. The  
20 other ones I would have to research and get back to you  
21 on. But not more than that; not more than four or five.

22      **"Q.** Could you describe, because I'm not sure I completely  
23 understand, what you mean by video reviews -- let me just  
24 finish or the court reporter will go crazy.

25                  "What I'm trying to understand is whether customers

1           actually create videos and post them, or who's -- who's  
2           putting these reviews -- who's creating these reviews?

3       **"A.** In Procter & Gamble's case, Crest Toothpaste may  
4           commission a community of moms and dads to give video  
5           testimonials that, I love crest and this is why it's a  
6           fantastic toothbrush.

7           "But it's not unlike what I'm doing here. You  
8           videotape it. And it's a video play of a person giving a  
9           review of that toothpaste and why they think it's a  
10          fantastic toothpaste.

11           "I take that video from Procter & Gamble and put it  
12          on Walmart for that SKU that's sold by Walmart. So you  
13          and I as consumers might look at that video as a point of  
14          reference and credibility, that that's a great tube of  
15          toothpaste and it's great for our families.

16       **"Q.** Mr. Matthews, you had explained that you only have  
17          three or four customers who currently syndicate ratings  
18          and reviews with you. Is there anything that is limiting  
19          your ability to syndicate ratings and reviews for any  
20          additional customers?

21       **"A.** No.

22       **"Q.** You had also mentioned during Ms. Brody's questions  
23          that you syndicate 50 or so reviews for those customers,  
24          50 or less reviews for these customers.

25           "Is there anything that is limiting your ability to

1 syndicate additional ratings and reviews content for these  
2 customers?

3 **"A.** No."

4 **MR. RUBINSTEIN:** Thank you, Your Honor.

5 I'd like to direct your attention to the couple of  
6 exhibits, DX1724 and DX1746. I'd like to move these into  
7 evidence, absent any objection.

8 **MR. BONANNO:** No objection, Your Honor.

9 **THE COURT:** All right. They're admitted.

10 (Defendant's Exhibits DX1724 and DX1746 received in  
11 evidence)

12 **MR. RUBINSTEIN:** Now we'd like to play a video from  
13 the deposition of Sierra Trading Post. And, again, there are a  
14 couple of exhibits mentioned. Hand this up. Go ahead.

15 (Videotape was played as follows:)

16 **"Q.** Can you tell me where you currently work.

17 **"A.** I work at Sierra Trading Post in Cheyenne, Wyoming.

18 **"Q.** What is your current title at Sierra Trading Post?

19 **"A.** Director of Web and emerging technologies.

20 **"Q.** Okay. And what are your job responsibilities in that  
21 role?

22 **"A.** I oversee Web operations, Web development, and  
23 identify opportunities in the emerging technologies space,  
24 and then build them.

25 **"Q.** Okay. When you say 'build them,' what do you mean by

1       that?

2       **"A.** Well, it's a mix of design and programming. So I've  
3       got a design team that we build the user experience, and  
4       then we hand it off to the programming team to -- to do  
5       the coding.

6       **"Q.** Could you describe Sierra Trading Post's business and  
7       its products for me.

8       **"A.** Sure. We are an off-price, multichannel retailer.  
9       We sell products that range from outdoor -- outdoor gear,  
10       like camping, hiking equipment, shoes, to high-end suits,  
11       kids' clothing, women's clothing, water sports. And --  
12       and everything we do is closeouts and seconds.

13       **"Q.** Okay. What are the different channels that you use  
14       to sell your products?

15       **"A.** We've got a catalog channel. We've got a small  
16       retail store footprint, four stores. And then the  
17       majority of the business is online. So we've got all the  
18       traditional online marking channels, affiliate marketing,  
19       paid search advertising, paid shopping. And all that  
20       funnels into our website.

21               And then we've got the mobile site and a couple of  
22       apps out there.

23       **"Q.** Are you familiar with the *Internet Retailer 500*?

24       **"A.** Yes.

25       **"Q.** Could you tell me what it is?

1       **"A.** It's a guide of -- ranked by -- in revenue, that goes  
2 from Amazon, who is always at the top, down to retailers  
3 that sell in the range of a million to several million  
4 dollars at the bottom.

5       **"Q.** Okay.

6       **"A.** It comes out annually with -- with revenue and a  
7 handful of other metrics for each one of those retailers.

8       **"Q.** I'll represent to you that someone in my office went  
9 to the Internet Retailers Top 500 Guide and printed out  
10 this profile of Sierra Trading Post. It identifies Sierra  
11 Trading Post, as you see on the top, as No. 102.

12           "Is that your understanding of its ranking, if you  
13 know?

14       **"A.** Yes. This just came out, too. This is the freshest  
15 information that's out there.

16       **"Q.** So I see down under 'Financial' on the bottom  
17 left-hand corner it says '2012 Web sales, 257,240,000.'  
18 You mentioned that the actual number is closer to  
19 235 million; is that correct?

20       **"A.** Yes.

21       **"Q.** Okay. All right. Is -- is your ranking on the top  
22 500 or IR500, is it sometimes called something that you  
23 actively monitor?

24       **"A.** Yes. We always know what place we're in every year.

25       **"Q.** Okay.

1       **"A.** And these guys don't get everything right, either.

2       **"Q.** Could you tell me a little bit about that.

3       **"A.** They provide information based off their own  
4           estimates.

5       **"Q.** I see.

6       **"A.** Sometimes companies give -- companies give them  
7           actual numbers, but I don't think most -- not all the  
8           companies are able to provide that or share that  
9           information with them.

10      **"Q.** Does Sierra Trading Post share any information with  
11           the people that put together this report?

12      **"A.** Not for 2012.

13      **"Q.** Are you familiar with ratings and reviews on the  
14           Sierra Trading Post website?

15      **"A.** Yes.

16      **"Q.** Do you know when ratings and reviews were first put  
17           on the website?

18      **"A.** Yes.

19      **"Q.** When was that?

20      **"A.** 2007.

21      **"Q.** Okay. And could you describe for me what Sierra  
22           Trading Post did to put ratings and reviews on its website  
23           in '07?

24      **"A.** Well, we -- we implemented the PowerReviews product.

25           They had a couple of different options: An out-of-the-box

1 versus a more customized version. We went with the more  
2 customized version.

3 "Q. Do you recall any of the history of how prices  
4 changed under the contract over time?

5 "A. Yes.

6 "Q. Could you tell me what you recall.

7 "A. At first it was -- it was very cheap. There might  
8 have been some contract fees. But the idea was that they  
9 would try to make it free, provided that we shared the  
10 content of the reviews that we gathered on our sites with  
11 their affiliate marketing portal, Buzzillions.

12 "Q. Uh-huh.

13 "A. And so we did that at some point. I believe they  
14 were not able to make that -- that work, and so started  
15 charging for reviews. It was still relatively cheap. And  
16 then we -- we did a pretty good job negotiating throughout  
17 the years over a handful of different contracts; kept our  
18 pricing pretty low.

19 "At the point where we added on another site, it  
20 looked like it was going to become a little bit more  
21 expensive, and we started to think about, you know, what  
22 we really wanted in a solution and whether it made sense  
23 to continue with PowerReviews.

24 "Q. So over the course of the relationship, what -- what  
25 did Sierra Trading Post contract for PowerReviews to do on

1 the site?

2 "A. At first it was strictly reviews, just the reviews  
3 product. And then eventually we added the Q&A portion.

4 "Q. Uh-huh. Was there an additional fee for the Q&A  
5 portion?

6 "A. Yes.

7 "Q. And so at what point did you begin to think about  
8 leaving PowerReviews?

9 "A. You know, from the very beginning, we had told them,  
10 you know, this doesn't have everything that we want, so at  
11 some point we may bring it in-house. But we didn't  
12 seriously consider it until really after -- after we heard  
13 that Bazaarvoice had purchased them.

14 "Q. Do you know when you -- approximately when you  
15 negotiated for the termination of the contract?

16 "A. It was in January, I believe, of 2013. We didn't  
17 have a negotiation. We just had a 30-day out --

18 "Q. Okay.

19 "A. -- I believe, that we had to put in.

20 "Q. So when did you put in your notice to terminate the  
21 contract?

22 "A. I believe it was in January.

23 "Q. Okay. And when did the contract end?

24 "A. The end of February.

25 "Q. Let's start at the beginning. When did you start

1 building the in-house solution for ratings and reviews?

2 "A. At some point in the fourth quarter of 2012.

3 "Q. And how many people worked on building the in-house  
4 tool?

5 "A. Probably four.

6 "Q. Okay.

7 "A. Not full-time. I mean, juggling with other projects.  
8 But at times some of those four were full-time.

9 "Q. And how long did it take them to complete the  
10 project?

11 "A. Several months.

12 "Q. Is it finished today?

13 "A. It's finished in the sense that it's functional. We  
14 have a handful of features that we'd like to add in the  
15 future.

16 "Q. Okay. So when did the in-house ratings and reviews  
17 first get put on the website?

18 "A. The same day that we took PowerReviews off. So it  
19 was February 28th, I believe.

20 "Q. Okay. And so if I go to the Sierra Trading Post  
21 website today, what I will see is the in-house ratings and  
22 reviews?

23 "A. Correct.

24 "Q. You said that the effort to build in-house ratings  
25 and reviews began fourth quarter 2012; is that correct?

1       **"A.** Yes.

2       **"Q.** You had developed a product that you were able to put  
3           on the website by February 2013, right?

4       **"A.** Right, yeah.

5       **"Q.** Do you believe it could have been done in less time?

6       **"A.** Had we focused on it with -- with no distractions  
7           from other projects, sure.

8       **"Q.** You mentioned that you wanted to develop some  
9           additional features. What are those features?

10      **"A.** Well, some of them have to do with SEO, search engine  
11           optimization, so we can get more of our questions and  
12           answers and reviews out there to increase our reach in the  
13           search engines. There's a handful of usability  
14           improvements that we can make with the design.

15      **"Q.** Were you ever concerned that you would not be able to  
16           build in-house what PowerReviews offered you in the past?

17      **"A.** No. We have a history of building almost all of  
18           our -- our platform in-house. Most of what we do is  
19           proprietary, so it's just been a matter of when do we want  
20           to -- to replace these third-party solutions in most  
21           cases.

22           "So we've -- and -- and it wasn't just a copy of what  
23           PowerReviews had. We built our own solution with features  
24           that we wanted.

25      **"Q.** Does your own solution include features that

1 PowerReviews was not able to offer you?

2 "A. Yes.

3 "Q. Could you give a few examples.

4 "A. Sure. One of the things that we wanted to do with  
5 this was improve customer service with our own in-house  
6 solution by allowing for the instantaneous postings of  
7 reviews, questions, and answers. That's not something  
8 PowerReviews was able to offer because of the moderation  
9 process. It sometimes took days. It was held up in the  
10 their queue. And by that time, a customer asks a  
11 question, a few days later it gets answered, they're  
12 already disinterested.

13 "So that was a big piece of it. We -- we tied it in  
14 to our existing account holders that are in our in-house  
15 system versus having a third-party system and having to  
16 share accounts. And we simplified the process. So in the  
17 PowerReviews solution there were a great many more  
18 decisions that a customer has to make when submitting a  
19 review. We simplified ours to about four decisions, I  
20 believe.

21 "Q. You mentioned ask and answer just now. Is that  
22 something that PowerReviews used to offer that you also  
23 built-in house?

24 "A. Yes.

25 "Q. Okay. And that development took place during the

1 same time period we discussed before, from fourth quarter  
2 2012 to February --

3 "A. Correct.

4 "Q. -- 2013? Okay.

5 "I'm going to mark as Defendant's Exhibit 190 -- 191,  
6 I'm sorry, this document. You can take a look at it.

7 "So I'll represent to you that I had someone in my  
8 office go to the Sierra Trading Post website and print out  
9 this page for the North Face Apex Bionic jacket and click  
10 on the reviews tab.

11 "Are you familiar with how the Sierra Trading Post  
12 website appears?

13 "A. Yes.

14 "Q. And does this look to you to be substantially similar  
15 to the Sierra Trading Post website, if not the same?

16 "A. Yes.

17 "Q. Okay. And if you look under the reviews tab in the  
18 middle of the page, and then down in the center, does this  
19 reflect what your team built in-house?

20 "A. Yes.

21 "Q. So, again, I'll represent to you that I had someone  
22 in my office go to the Sierra Trading Post website and go  
23 to this Web page and click on the Q&A tab. This is for  
24 the White Sierra Trabagon rain gear jacket for men.

25 "And let me start by asking you, are you familiar

1 with the Sierra Trading Post pages that have Q&A on them?

2 "A. Yes.

3 "Q. And does this document appear to reflect Sierra  
4 Trading Post's website as it -- as it displays Q&A?

5 "A. Yes.

6 "Q. You mentioned that PowerReviews was sometimes slow to  
7 moderate questions, often taking two or three days; is  
8 that correct?

9 "A. Yes.

10 "Q. So how do you turn questions around -- excuse me.  
11 How do you respond to questions more quickly using the  
12 in-house tool?

13 "A. Well, we only hold ours in moderation if they meet  
14 certain criteria that we don't agree with. So most  
15 reviews do not meet this criteria, and they get published  
16 to the site instantly. Which didn't happen that way with  
17 PowerReviews because before we ever received the  
18 information from PowerReviews, it was held up on their  
19 side for several days.

20 "Q. So let me make sure I understand. You developed your  
21 own in-house criteria to determine when questions would  
22 automatically be posted to the website?

23 "A. We decided on what criteria would allow reviews and  
24 questions and answers to be posted to the site immediately  
25 versus what needed to be held -- held back in the

1 moderation queue, yes.

2 "Q. Does the company do moderation for Q&A today?

3 "A. Yes.

4 "Q. Does the company do moderation for ratings and  
5 reviews?

6 "A. Yes.

7 "Q. Okay. Do you know approximately how many people are  
8 in charge of moderating the content for question and  
9 answer?

10 "A. It's mainly one person. And a couple of other people  
11 know how to do it as well.

12 "Q. And how many people moderate the ratings and reviews  
13 on the site?

14 "A. Same person.

15 "Q. Okay. So one person does the moderation for both Q&A  
16 and ratings and reviews?

17 "A. Correct. And the community helps too. So in Exhibit  
18 191, you can see there's a 'flag as inappropriate' --

19 "Q. Uh-huh.

20 "A. -- functionality, and so the community can help to  
21 moderate as well.

22 "Q. And when you say 'the community,' you mean what?

23 "A. Any visitor to the website.

24 "Q. Do you recall how much on an annual basis you were  
25 paying PowerReviews for the ratings and reviews and answer

1 functionality at the time the contract ended in  
2 February 2013?

3 "A. I don't recall exactly what it was.

4 "Q. Do you remember a ballpark number?

5 "A. I believe it was around maybe 7,000 a month for the  
6 entire package.

7 "Q. Have you ever received ratings and reviews from  
8 another site and then put them on your site?

9 "A. No.

10 "Q. How do you typically decide whether to build  
11 something in-house versus go to a third party to acquire  
12 the functionality?

13 "A. If it's -- well, oftentimes nascent technology we  
14 will test with a third party to see if it's something that  
15 we -- we like and want to keep long-term. But if we have  
16 a new idea, even if there are technologies out there that  
17 would power that, if we consider it to be a really core  
18 set of functionality, we'd rather build it in-house so  
19 that we can own it and customize it to our needs.

20 "If there's something that does not need to be  
21 customized, we don't feel like we have to build it  
22 in-house.

23 "Q. How does cost factor into that decision?

24 "A. Cost is weighed heavily also. We're a very lean  
25 company and we watch our costs. So we don't really like

1 software-as-a-service fees on a variable-cost basis.

2 "Q. Was search engine optimization something you received  
3 from PowerReviews, if you recall?

4 "A. Search engine optimization, as I recall it, we really  
5 drove -- part of the reason that we didn't use their  
6 out-of-the-box solution and we went with the customized is  
7 because we wanted SEO. And from the beginning, we were  
8 the first client that -- that pushed for this. And they  
9 ended up eventually developing a SEO product based mainly  
10 on the demands that we had.

11 "But we continued to use our own in-house SEO  
12 solution even through the period that we were using the  
13 PowerReviews service.

14 "Q. So you developed an in-house SEO tool before  
15 PowerReviews did?

16 "A. Well, we implemented the -- the display of the  
17 reviewed data in a way that they could not, from the very  
18 beginning, yes.

19 "Q. So in -- in your view, building an in-house ratings  
20 and reviews tool was a better alternative than continuing  
21 with PowerReviews?

22 "A. Yes.

23 "Q. Was it also a better alternative than going to  
24 Bazaarvoice?

25 "A. Yes.

1       **"Q.** Do you believe that Sierra Trading Post has been  
2       harmed in any way from the acquisition of PowerReviews by  
3       Bazaarvoice?

4       **"A.** No.

5       **"Q.** When you developed the display format for your  
6       ratings and reviews in-house --

7       **"A.** Yes.

8       **"Q.** -- was PowerReviews offering search engine  
9       optimization as a feature?

10      **"A.** No.

11      **"Q.** Okay.

12      **"A.** Not at the very beginning, no.

13      **"Q.** One of the things that we talked about earlier was  
14       the changes in the pricing that you experienced from the  
15       beginning of the relationship with PowerReviews until the  
16       end of the relationship. I'm wondering if you remember  
17       the company, whether it's you or your team, telling  
18       PowerReviews that you would discontinue them as a  
19       provider.

20      **"A.** No, not until we gave our -- our final notice.

21      **"Q.** Did you ever tell them that you were thinking about  
22       developing your own in-house solution?

23      **"A.** Yes.

24      **"Q.** And was that a negotiating tactic or something else?

25      **"A.** No, it was just the truth.

1       **"Q.** Okay.

2       **"A.** We were -- we were transparent with that from the  
3                     very beginning."

4       **MR. RUBINSTEIN:** Your Honor, we'd like to move into  
5                     evidence the couple of exhibits that I presented to you, absent  
6                     any objection.

7       **MS. SCANLON:** No objection.

8       **THE COURT:** All right. They're admitted.

9                     (Defendant's Exhibits DX1644 and DX1668 received in  
10                     evidence)

11       **MR. RUBINSTEIN:** Thank you. And we have one final  
12                     clip today --

13       **THE COURT:** There is no cross-designation on this one?

14       **MR. RUBINSTEIN:** No. I'm sorry, there is not, I don't  
15                     believe.

16       **MS. SCANLON:** No, Your Honor.

17       **THE COURT:** Okay.

18       **MR. RUBINSTEIN:** And we have a company called Abe's of  
19                     Maine, and I'd like to hand up the transcript and one exhibit.

20                     (Videotape was played as follows:)

21       **"Q.** So let's get started. Can you provide me the company  
22                     that you work with, and your job title.

23       **"A.** The company I work for is Abe's of Maine. My job  
24                     title is Director of Marketing, of Web marketing  
25                     specifically.

"Q. And is Abe's of Maine the official corporate name of the entity?

"A. I believe it's Abe's Electronics, Inc.

**"Q.** And how long have you held your current position as the director of Web marketing?

**"A.** Almost two years.

"Q. What are your general responsibilities in that position?

**A.** I oversee all Web marketing, email affiliate, social...

**Q.** Do you have any role with the maintenance or use of ratings and reviews on Abe's of Maine website?

"A. I do.

**"Q.** Could you please provide me with a brief overview of the business of Abe's Electronics.

**"A.** Sure. They are a consumer electronics retailer.

They sell mainly on their website.

**"Q.** Does Abe's sell products through retail channels

<http://www.tibco.com/Products/Informatica.aspx>

## • 6 What are the main risks?

Third-party marketplaces such

eBay, stuff like that.

Does ABC Electronics have a brick and mortar physical store?

**A.** They do.

1       **"Q.** Are you familiar with the term social commerce?

2       **"A.** I am.

3       **"Q.** Could you give me your own personal definition of  
4       that term?

5       **"A.** Commerce that takes place through the use of social  
6       media.

7               **"UNIDENTIFIED SPEAKER:** I'm sorry. Could you repeat  
8       that.

9               **"THE WITNESS:** Commerce that takes place through the  
10      use of social media.

11       **"Q.** And could you give me some examples of what you would  
12      consider social commerce.

13       **"A.** Uhm, I guess on a basic level, commerce through  
14      social outlets such as Facebook. Also -- there's also --  
15      I guess in this instance I should mention commerce that's  
16      taking place through, I guess, reviews.

17       **"Q.** Are you familiar with the term products ratings and  
18      reviews?

19       **"A.** Yes.

20       **"Q.** Does Abe's Electronics utilize a vendor for product  
21      ratings and reviews on AbesOfMaine.com?

22       **"A.** Yes.

23       **"Q.** Do you know who that vendor is?

24       **"A.** Bazaarvoice.

25       **"Q.** Are you familiar with other providers of ratings and

1 reviews?

2 "A. Yes.

3 "Q. What other ratings and reviews providers are you  
4 familiar with?

5 "A. Reevoo.

6 "Q. What is your familiarity with Reevoo?

7 "A. They had contacted me to see if we would use them as  
8 a provider.

9 "Q. When did that communication first occur?

10 "A. Last year sometime.

11 "Q. What was the nature of their first communication with  
12 you?

13 "A. I think they wanted to introduce themselves as a --  
14 they wanted to introduce themselves.

15 "Q. Were you ever introduced to people from Reevoo?

16 "A. Before that?

17 "Q. No, after the original communication.

18 "A. Yes.

19 "Q. Did you have a meeting with people from Reevoo?

20 "A. Over the phone, yes.

21 "Q. Do you have any idea when that meeting occurred?

22 "A. I don't, offhand.

23 "Q. And what was the nature of that meeting?

24 "A. We had a walk-through of what the product was capable  
25 of.

1       **"Q.** Generally, what was the Reevoo product capable of?

2       **"A.** It seemed to me it was the same thing as Bazaarvoice.

3           And they also had a syndication, and they would take  
4           other -- other -- at the time I didn't know if  
5           PowerReviews had it, but they had a product that was able  
6           to take other -- other reviews and put them on our site.

7       **"Q.** Did you discuss pricing with Reevoo?

8       **"A.** I did.

9       **"Q.** How did Reevoo's pricing compare to the price you  
10          were receiving from Bazaarvoice at that time?

11       **"A.** I don't remember exactly what their pricing was, but  
12          they had made it clear that they would do everything they  
13          can to match Bazaarvoice's price, even to the extent of  
14          buying us out of the contract with Bazaarvoice, whatever  
15          was left over, if there would have been some sort of  
16          penalty for breaking contract.

17       **"Q.** Well, do you know if Abe's of Maine ever had an  
18          agreement with PowerReviews?

19       **"A.** Yes.

20       **"Q.** And when was that agreement?

21       **"A.** That was our initial agreement.

22       **"Q.** When you first joined at Abe's Electronics, was the  
23          agreement for ratings and reviews with PowerReviews or  
24          Bazaarvoice?

25       **"A.** I believe it was with PowerReviews.

1       **"Q.** Going back to the line of questions that we were on  
2 before that, why was the decision made to stick with  
3 PowerReviews/Bazaarvoice?

4       **"A.** We were happy with the service that we had. I knew  
5 it was a reputable company, so there was no reason to  
6 change. But there was one caveat, that we were going to  
7 renegotiate because the pricing was a lot higher.

8       **"Q.** Can you clarify that statement? Which pricing was a  
9 lot higher?

10      **"A.** The pricing for -- we were going to see if we could  
11 get better pricing for PowerReviews.

12      **"Q.** Because the pricing was a lot higher than what?

13      **"A.** Than Reevoo was offering us.

14      **"Q.** Did you communicate to Bazaarvoice that you were  
15 considering using Reevoo?

16      **"A.** I did.

17      **"Q.** Did you communicate to Bazaarvoice that the price  
18 being offered by Reevoo was lower than that which Abe's  
19 was receiving from Bazaarvoice?

20      **"A.** I believe so, yes.

21      **"Q.** Did you indicate to Bazaarvoice that you would want a  
22 price decrease to maintain the relationship?

23      **"A.** I did.

24      **"Q.** Did Bazaarvoice indicate a willingness to lower your  
25 price?

1       **"A.** They had.

2       **"Q.** Earlier in the deposition you mentioned the term  
3           'syndication.' Are you familiar with the term  
4           'syndication'?

5       **"A.** When I -- when I'm referring to syndication, I mean  
6           to say that there were reviews that were posted about a  
7           certain product somewhere else, and they were used on our  
8           site. Similarly, if they were used on our site, they  
9           would be repurposed somewhere else.

10      **"Q.** Sure. And did Reevoo offer syndication?

11      **"A.** Yes.

12      **"Q.** Does Bazaarvoice offer syndication?

13      **"A.** Yes.

14      **"Q.** Does Abe's Electronics utilize the syndication  
15           offering?

16      **"A.** It's in our current contract. I don't know if it's  
17           been implemented yet.

18      **"Q.** Was syndication in the contract with  
19           PowerReviews/Bazaarvoice prior to the March/April 2013  
20           agreement?

21      **"A.** I don't think so.

22      **"Q.** So, to your memory, the availability of  
23           syndication -- the offering of syndication was first  
24           included in the March/April agreement with Bazaarvoice?

25      **"A.** Yes.

1       **"Q.** And that was the same agreement in which your price  
2                  was dropped \$1,500 over a 3- or 4-month period?

3       **"A.** Yes.

4       **"Q.** Did you mention to Bazaarvoice that Reevoo had  
5                  offered you syndication?

6       **"A.** I believe so.

7       **"Q.** When you were negotiating with Bazaarvoice in the  
8                  most recent round of negotiations when you renewed  
9                  their -- your contract with them this year, did  
10                 Bazaarvoice tell you about the value of their syndication  
11                 network?

12       **"A.** The value of it? They -- they told me about it, and  
13                 I was interested in it.

14       **"Q.** What was their pitch to you as to why it was -- it  
15                 would be of value to your company?

16       **"A.** I -- I -- as far as I can recollect, that it was  
17                 you're getting more reviews for a product. It's more  
18                 information for the customer.

19       **"Q.** Did Bazaarvoice tell you how many partners are in  
20                 their syndication network?

21       **"A.** I don't remember.

22       **"Q.** What selling points did Bazaarvoice use to get you to  
23                 sign up with them again when you renewed your contract in  
24                 or about April of 2013?

25       **"A.** It was the price, the fact that they had the

1 syndication like Reevoo had had. They had added the --  
2 they had added the -- I forgot what it's called -- the  
3 email service to our contract. And I had been happy with  
4 them, so.

5 "Q. Did they provide any sort of comparisons to help you  
6 understand whether Bazaarvoice's syndication network was  
7 bigger than Reevoo's?

8 "A. No.

9 "Q. When do you think your meeting with Reevoo was?

10 "A. December 10th, 2012.

11 "Q. Did your price negotiations with Bazaarvoice happen  
12 after this discussion with Reevoo?

13 "A. Yes.

14 "Q. How much of a price decrease did you seek from  
15 Bazaarvoice?

16 "A. As much as they could offer me.

17 "Q. Was there -- did you have any specific requests?

18 "A. I wanted it to be substantially lower. I don't -- I  
19 didn't ask for anything specific.

20 "Q. Did Bazaarvoice ultimately lower -- lower the price  
21 of your contract?

22 "A. They did.

23 "Q. Do you have a general idea of how much of the price  
24 was lowered?

25 "A. It went from \$4,500 for -- I think we were billed at

PROCEEDINGS

1       3- or 4-month increments to \$3,000. And they also give us  
2       extra -- extra services.

3       **"Q.** How did the price which you ultimately received from  
4       Bazaarvoice in the March or April agreement of 2013  
5       compare to that being offered by Reevoo?

6       **"A.** I think it was -- I think it was on par. I think it  
7       was -- I think it was pretty good.

8       **"Q.** Do you believe that Reevoo's presence in the ratings  
9       and reviews market allowed you to receive a lower price  
10      from Bazaarvoice?

11      **"A.** Yes.

12      **"Q.** Why do you think -- why do you think that's the case?

13      **"A.** Because I had mentioned in my renegotiations that we  
14      were considering using another company, Reevoo.

15      **"Q.** Have you given any thought to the acquisition of  
16      PowerReviews by Bazaarvoice?

17      **"A.** Uhm, I have not.

18      **"Q.** Would it be fair to say that you're not concerned  
19      about the merger?

20      **"A.** It would be fair to say I'm not concerned about the  
21      merger.

22      **"Q.** Do you believe the acquisition of PowerReviews by  
23      Bazaarvoice has harmed Abe's Electronics?

24      **"A.** No."

25      (Videotaped testimony concluded.)

PROCEEDINGS

1           **MR. RUBINSTEIN:** Your Honor, I don't believe the  
2 Department of Justice has any counter. Is that correct?

3           **MS. SCANLON:** That's correct, Your Honor.

4           **THE COURT:** Okay.

5           **MR. RUBINSTEIN:** And I'd just like to move into  
6 evidence the Exhibit DX1152, that was attached, if there's no  
7 objection.

8           **MS. SCANLON:** No objection.

9           (Defendant's Exhibit DX1152 received in evidence)

10          **MR. RUBINSTEIN:** And, just for the record, because I  
11 don't think I stated it before, Sierra Trading Post exhibits  
12 were DX1644 and DX1668.

13          And at this time we're done with these videos.

14          **MR. FELDMAN:** I'm sorry. We don't have other live  
15 witnesses ready today. We're flying them in.

16          So tomorrow we have four live witnesses, three customers:  
17 World Kitchen, AutoZone and IHG.

18          And then we have a Bazaarvoice employee, Matthew Curtin.  
19 And we'll have some more video ready that we'll have designated  
20 to the plaintiff.

21          **THE COURT:** Okay.

22          **MR. FELDMAN:** But for today we're out of ammo.

23          **THE COURT:** I hear you. And this case may be going a  
24 little faster than you anticipated, and I understand that.

25          Can you tell me, generally, where we are in the schedule

PROCEEDINGS

1 of -- in my schedule?

2           **MR. FELDMAN:** Yes. I think that Ms. Alepin is better  
3 qualified to do that than I.

4           **MS. ALEPIN:** Your Honor, we are scheduled to have  
5 customer testimony tomorrow. The last Bazaarvoice witness will  
6 be tomorrow. And then we have some customers next week who are  
7 lined up. And, also, there will be a Bazaarvoice board member.  
8 And our expert will testify on Monday.

9           And then we'll finish with our economist, Dr. Shehadeh, on  
10 Wednesday into Thursday. And then the plaintiff has reserved  
11 time for rebuttal. Oh, sorry, Mr. Comée will also be on that  
12 Wednesday.

13           So we had scheduled to have October 9th, which is why  
14 we're still -- we still will have customers and Mr. Comée come  
15 in on the 9th. And then we'll start with Dr. Shehadeh on the  
16 9th, into the 10th. And then I think the plaintiff has  
17 reserved time for rebuttal.

18           **THE COURT:** So are we going to go beyond next  
19 Thursday, Mr. Huston, do you think?

20           **MR. HUSTON:** Your Honor, I think, as far as the  
21 evidence, my -- I think we can fit the evidence in through  
22 Thursday. Our thought was possibly go beyond with respect to  
23 closing. But with respect to the evidence I think we can fit  
24 it in. There may be some juggling we have to do with respect  
25 to the defendants, but I think we can do it.

PROCEEDINGS

1           **THE COURT:** Okay.

2           **MR. JACOBSON:** Your Honor, I don't think that's  
3 necessary. We previously discussed with the Court possibly  
4 using Thursday afternoon, after the plea change.

5           **THE COURT:** Yes.

6           **MR. JACOBSON:** So I think there's a strong preference  
7 to finish up on Thursday, if we can.

8           **THE COURT:** Okay. And are we going to have other  
9 gaps, would you guess, just given the way that things are  
10 orchestrating?

11          **MR. JACOBSON:** I think this is the most white space  
12 you're going to see. There might be a tiny bit tomorrow, but  
13 we're -- we're endeavoring to eliminate that. As I mentioned  
14 to you last week, I thought there would be some, and I think  
15 today was really it.

16          **MR. HUSTON:** And with respect to the closing issue,  
17 Your Honor, the preference we would have would be to have some  
18 time to incorporate the expert testimony that the defendants  
19 have so that we can prepare our closing. And so that's why  
20 we're trying to build in a little space there.

21          **THE COURT:** Okay. Well, you should discuss between  
22 yourselves what you think the best schedule is for that.

23          And I've been thinking about this as one of two ways: One  
24 way that might be useful is when the live testimony ends,  
25 there's still a lot of documents that I'm going to have to go

PROCEEDINGS

1 through, and some depositions, before the evidence is complete  
2 for me. So one thing you might want to do is close shortly  
3 after the live testimony and tell me what else I'm going to be  
4 seeing. Sort of do a pre-close. And then you'll be briefing  
5 and providing, I think, amended findings of fact. And then you  
6 wouldn't need to do a final close.

7 Or you might want to take a little more time with the  
8 evidence that you've got and do a full-on closing.

9 And I'm willing to go with whichever way you want to do  
10 it. And if you want some time, you know, if you want a week to  
11 wait, I'm going to be trying to work through the rest of the  
12 evidence on this same sort of 8:00-to-1:00 track, behind closed  
13 doors, until I'm finished with it.

14 So talk amongst yourselves, and let's talk again when  
15 you're -- when you have an idea of what you want to propose to  
16 me.

17 **MR. HUSTON:** That sounds fine, Your Honor. We'll talk  
18 with defense counsel about that.

19 And on that very subject of the testimony and the  
20 documents that you're going to be reviewing, yesterday, at some  
21 point, I think it was towards the end of the day, counsel  
22 handed you what I think is supposed to be some sort of guide to  
23 the deposition testimony.

24 We took a quick look at it. We did have some problems  
25 with it. Our view is that we don't think you need that to go

PROCEEDINGS

1 through the deposition testimony.

2 So our preference would be rather than to create a whole  
3 situation and try and figure out what the errors are, that you  
4 just not use it.

5 But, obviously, if Your Honor thinks something like that  
6 is helpful, we would engage with defense counsel and prepare  
7 something that we could both live with.

8 **THE COURT:** At the moment, I have no idea whether it's  
9 useful for not. So if you want to talk with them and explain  
10 what your issues are about it, at the time that I take a look  
11 at it then we can talk about it again.

12 **MR. FELDMAN:** Great. If there's anything wrong in it  
13 we're happy to correct it.

14 **MR. JACOBSON:** Your Honor, I did have one question.

15 First of all, I would commend to Your Honor yesterday's  
16 *Daily News* headline, *New York Daily News*. You can find it  
17 humorous and appropriate given the circumstances we have.

18 But in light of the closure, I know the U.S. Courts'  
19 website indicates that there's ten business days that the  
20 courts will be opened.

21 Should we view that as a constraint, or should we try to  
22 just either be optimistic or fight through it?

23 **THE COURT:** I think everybody's in uncharted waters.  
24 My belief is that I'm going to be holding court for a very long  
25 time. And so I don't see it as a constraint, but I really

PROCEEDINGS

1 don't know what's going to be happening for other people ten  
2 days from now.

3 **MR. JACOBSON:** It may be hard to get into the  
4 building. And we know, you know, it's a hardship for the  
5 people who are not going to be paid. And so that's one of the  
6 reasons that we wanted to really wrap this up on Thursday.

7 **THE COURT:** I think for a lot of reasons that's a good  
8 idea.

9 **MR. JACOBSON:** Okay. Thank you.

10 **MR. FELDMAN:** Thank you, Your Honor.

11 **THE COURT:** All right. We'll see you tomorrow at  
12 8:00.

13 **MR. FELDMAN:** Thank you.

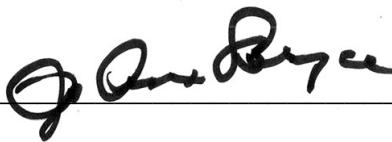
14 (Proceedings adjourned at 10:41 a.m.)

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4 **CERTIFICATE OF REPORTERS**

5 I certify that the foregoing is a correct transcript  
6 from the record of proceedings in the above-entitled matter.

7  
8 DATE: Tuesday, October 2, 2013  
9  
10

11   
12 \_\_\_\_\_  
13 Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
14 U.S. Court Reporter  
15

16   
17 \_\_\_\_\_  
18 Katherine Powell Sullivan, CSR #5812, RMR, CRR  
19 U.S. Court Reporter  
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